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v.1



REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

~~G. B.~~ COURT OF EXCHEQUER;

FROM

EASTER TERM, 54 GEO. III.

TO

TRINITY TERM, 55 GEO. III.

BOTH INCLUSIVE.

VOL. I.

By GEORGE PRICE, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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ADVERTISEMENT.

THE Reporter who has undertaken to collect the decisions of the Court of Exchequer for publication, on the secession of the late *Mr. Wightwick*, reluctantly augments the number of these pages, by prefixing any thing, however brief, of his own ; but he feels himself called on to make his acknowledgments, for the assistance afforded him, which has greatly contributed to encourage his progress, and facilitate his labours.

A faithful Report of the decisions of this Court has ever been considered a great desideratum by the profession of the law ; and without it there must ever be a chasm in our national jurisprudence.

The distinguished names, and high professional reputation of the learned judges, to whom that equal share of the judicial authority of the State, which is administered in His Majesty's Court of Exchequer, is at the present time delegated ; must recommend any attempt to rescue their valuable opinions from being lost to the profession, by a sanction of so powerful an influence, as, in some measure, to atone for an imperfect execution in the first instance, and to encourage, in future, an assiduity worthy of such an object.



JSN
JAP
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v.1

J U D G E S
OF THE
COURT OF EXCHEQUER,

During the Period of these Reports.

The Right Honourable Sir ALEXANDER
THOMSON, Knt.
Sir ROBERT GRAHAM, Knt.
Sir GEORGE WOOD, Knt.
Sir RICHARD RICHARDS, Knt.

REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

EASTER TERM,—54 GEO. III.

MATHER v. BAILEY.

1814.

*Tuesday,
3d May.*

BENYON moved to set aside the verdict, obtained at the last assizes for Chester, in this cause, which was an action on the case for a malicious prosecution: and that a new trial might be directed, on the ground of mistake in recording the amount of damages.

The Court will not interfere to disturb a recorded verdict on the affidavit of one of the Jury, that the amount of the damagestaken exceeded what they had intended to have given.

It appeared by the affidavit of one of the Jury, that this was one of two actions which were brought against the defendant, and had come on to be tried at the Chester Lent Assizes; and, that as the evidence was precisely the same in both cases, the Jury were directed that their verdict in one would decide the merits of the other—that they found for the plaintiff, and gave 1,000*l.*

VOL. I.

B

damages;

1814-

MATHER
v.
BAILEY.

damages; but that it had been the intention of the deponent, and as he believed of the rest of the Jury, that the sum so given should include the damages in both actions collectively, and had not been awarded distinctively in each, as the verdict had been erroneously taken by the officer of the court.

THOMSON, Chief Baron. This misapprehension is somewhat remarkable, for the Jury must have been re-sworn in the second cause, and must have returned a second verdict. It would be dangerous to meddle with a recorded verdict on such grounds.

GRAHAM, and WOOD, Barons, concurred.

RICHARDS, Baron. This was a prosecution for Burglary. 1,000*l.* damages in each is not excessive.

Rule refused.

Saturday,
7th May.

Justification
of bail at
Chambers in
vacation with-
out consent,
held not good,
but plaintiff
not objecting
to an applica-
tion to the
Court to per-
mit such jus-
tification,
considered
tantamount
to consent.

SAYERS v. TOLFREE.

DAUNCEY and HUGHES this day shewed cause against a rule obtained by *D. F. Jones* on the 29th of April, to discharge an order on behalf of defendant, of the 12th of February, to stay proceedings on an attachment against the Sheriff for not bringing in the body, with leave to amend bail-piece, and justify within ten days, on payment of costs of opposing.

The bail in the cause should regularly have justified on the 11th of February, but on objection that they

they were too generally described held good, and no application being then made for further time, the attachment was moved for on the same day, and obtained. The next day *Hughes* obtained the above order to stay proceedings, &c. On the 19th the same bail justified at Mr. *Baron* Wood's chambers, where plaintiff's Clerk in Court, having received notice, did not attend to oppose them.

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SAYERS
v.
TOLFREE.

It was now insisted that the attachment had been prematurely obtained. Bail being excepted to, they had four days to justify, which must necessarily be the first four days of the present term (*a*). The rule to bring in the body, and to return the writ proceed *pari passu*. The plaintiff had no right to lie by in this manner that he might fix a clerk in court with debt and costs. By not attending at the Baron's chambers, they had tacitly waived their right to except. At all events, the bail might have justified within the first four days of term. It has been the constant practice to justify at chambers. They also objected to the plaintiff's attachment as informal, in not expressing in the title of the cause the christian name of either of the parties, and that it could not therefore be proceeded on.

D. F. Jones, in support of the rule. The question now between us is not whether the bail might have justified otherwise than they have attempted to do, but whether this justification is good or not. That will depend on the power of the court to direct that bail should be taken in vacation. It is a ques-

(*a*) On reference to the Master, this was certified to be the practice.

1814.
SAYERS
v.
TOLFREE.

tion of practice. The rule to bring in the body expired on the 10th, and we were entitled to the attachment on the 11th; and the rule is clear that bail cannot justify in vacation, but by consent.

[GRAHAM, *Baron*. You should have opposed the order; not having done so, you have in fact consented.]

All we ask by the present motion is, that as we have lost the opportunity of trying the cause at the last Assizes, we may be entitled to the attachment, for further security, by the rule of 12th of *February* being discharged.

The COURT were of opinion, that though bail could not regularly justify at chambers in vacation, but by consent, except in the case of a prisoner; yet as they considered that the plaintiff had indirectly consented to the justification in the present case, they discharged the rule without costs, on condition of the bail then justifying in court.

Friday,
6th May.

In the matter of the Ship MARIA, and other
Vessels and their Cargoes.

It is not necessarily essential to an order of the Commissioners of Customs, made under the 5th Geo. 3. to restore goods

A RULE had been obtained, calling on the collector of the Customs for the port of Falmouth, to shew cause why the writ of appraisement of these vessels and their cargoes, sued out of this court by the seizing officer, should not be quashed, and all further proceedings thereon stayed.

seized, that any terms or conditions should be imposed on the Proprietors by the order, and the Court will not refuse to stay proceedings on a Writ of Appraisement on that ground, although the application proceed from the Crown. But they will not quash the writ if regularly issued.

The

The application was made on the part of the commissioners of the Customs, in aid of an order made by them under the authority of the 51st Geo. III. ch. 96, for restoration of the subject of seizure, founded on their certificate that the forfeiture had been incurred without fraud on the part of the owners.

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In the matter
of the Ship
MARIA, &c.

Abbott, and *Brougham*, now shewed cause on behalf of the seizing officer, and submitted two objections to the present application. First, That admitting the commissioners order to be valid, and such as they were empowered by the act to make, the application founded on it should have proceeded from the claimant, whoever he might be, and not from the crown, as in the present instance. The other objection was to the order itself, which they contended was not such an order as it was competent to these commissioners to make, not according with the tenor of the several acts of Parliament under which their authority to restore goods seized was derived. In support of this objection it was urged, that, from the language of this statute of the 51st Geo. III. in which the act of the 27th of the same reign was embodied, it was evident that the Legislature had intended to require, that in all cases of restoration of goods seized by the officer under the statute, the commissioners should, by their order to restore, impose on the proprietors certain preliminary terms, in the nature of conditions, to be complied with on their part, for the protection of the seizing officer. By the 27th Geo. III. ch. 32, sec. 15, it is enacted, "that in case any goods, &c. or any ships, &c. shall

1814.

In the matter
of the Ship
MARIA, &c.

“ shall be seized as forfeited, by virtue of any act of Parliament relating to the revenue of Customs, it shall be lawful for the commissioners, on evidence given to their satisfaction, that the forfeiture arose without any design of fraud on the part of the proprietors, to order the same to be restored to such proprietors, in such manner, and *on such terms and conditions*, as under the circumstances of the case shall appear to them to be reasonable; and if the said proprietors shall comply with such terms, it shall not be lawful for the officers who shall seize such goods, &c. to proceed in any manner for the condemnation thereof: but if they shall not comply with the terms and conditions prescribed by the said commissioners, such officer shall be at liberty to proceed for the condemnation of such goods, &c. as if this law had not been made.” Then follows a proviso, that if the proprietors shall accept the terms and conditions, they shall not have, or be entitled to any recompense, or damage, on account of the seizure of such goods, &c. The 51st Geo. III. ch. 96, adopts the provisions of that act, and extends the power of the commissioners to order restoration of all seizures whatever, and concludes with an enactment, in the words of the 27th Geo. III. ch. 32, contemplating throughout terms and conditions, which should therefore form the basis of the order, for the protection of the seizing officer, indemnifying him from actions, by excluding the proprietors accepting the terms imposed, from any right to recompense or damage; or to maintain any action. Wherever the order for restoration is mentioned, terms are constantly

stantly and uniformly adverted to by these statutes, and all the others to which they refer. To recur to the first objection,—if this order shall not be found defective, for the reasons urged, yet the Court should not quash this writ, or stay the further proceedings on it, till the proper party shall come regularly before it, to make the necessary application, that the Court, by imposing the required terms on him, may thus supply the omission of the commissioners. This application too is irregular, and should not be allowed, because its immediate object is not to suspend the execution of the writ, but to quash it. The only legitimate ground for such an application would be, that the writ had improperly issued in the first instance, on a satisfactory representation to the court, that facts were then in existence which, if disclosed at the time, would have induced the court to have refused the writ, and not, as was now attempted, by showing matters arising *ex post facto*. The officer was justified in seizing; and this writ which has been obtained, was a necessary step towards the condemnation of the vessel. It is in the nature of a judgment, and therefore cannot be set aside but for some error in obtaining it. The Crown does not admit that the writ has improperly issued; and on the face of the commissioners' certificate, it is declared that no fault is imputable to the owners of these vessels; and therefore it is, that this application of the Crown is resisted, lest the seizing officer, who has only done what he might have forfeited his office for omitting, should be liable to an action for having performed his duty by this seizure, in which this certificate of the

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In the matter
of the Ship
MARIA, &c.

1814. commissioners might be read in evidence against him.
In the matter
of the Ship
MARIA, &c.

[*GRAHAM, Baron.* A forfeiture also appears on the face of the certificate, and that would preclude the proprietors from bringing any action against the seizing officer.]

But if the claimant himself had come before the court to make this application, he might have been subjected to conditions from which the officer's protection would result.

Dauncey, contrà. The question is now become one of form merely. This Court is applied to by the commissioners, to quash a writ issued at their instance, which they no longer require, and which can be of no further use. Nor could the officer after this order of the commissioners, which they are authorized by the act to make, avail himself of the writ, if it were not to be quashed; for all further proceedings on it by him would now be illegal. It is from the commissioners that all authority emanates. The Attorney-General, whom I represent, acts wholly under their directions, and might enter a *nolle prosequi*. This Court itself is only ancillary to them, and could not order restoration, as the commissioners are empowered to do. Nor can the court aid a seizing officer against the act of the commissioners, proceeding under the sanction of a wholesome statute, made for the convenience and relief of the subject; and no part of that statute gives the officer a right to resist this proceeding

ceeding in this manner. As to his requiring indemnity, that has been already answered by one of your Lordships. The forfeiture is recognized on all sides, and surely no premium to the seizing officer should intervene between this act of Parliament and the subject. It is said the party claiming should be here, and that this application should be made to the court by him, but if he were, the court could not impose terms on him.

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In the matter
of the Ship
MARIA, &c.

[*Chief Baron.* There can be no doubt, if a party comes to ask the favour of the court, it may annex conditions of granting it.]

But here he comes for no favour, nor should the court drive him to the expense of a proceeding of which he does not stand in need, the commissioners having already done all that is requisite towards the restoration of this property, by an act which necessarily puts an end to all suits. Nor is this application made on matter arising *ex post facto*, as has been said ; the circumstance on which it is made, the absence of fraud on the part of the proprietors, is matter necessarily anterior to the issuing of the writ. Your Lordships are told that you have no power to set aside a judgment which is regular, but that you may stay execution on one which is irregularly obtained : but this writ may have been improperly issued ; the seizure may have been wrongful, and a misrepresentation of circumstances may have induced the commissioners to do what they have done.

Cur. adv. Vult.

1814.10th May.In the matter
of the Ship
MARIA, &c.

THIS day THOMSON, *Chief Baron*, delivered the judgment of the Court.

This application is made to the court on the part of the commissioners of the Customs, on the ground of their order, made in pursuance of the powers vested in them by the 51st Geo. III. ch. 96, which is founded on the 27th of the same reign, ch. 32. The 27th confines that power to ships seized for breach of the revenue laws. The 51st extends it to all seizures made for any cause of forfeiture whatever. Under the authority of this last act the commissioners are empowered to order restoration of all goods seized, on such terms and conditions as under the circumstances of the case shall appear to them to be reasonable; and that if the proprietors shall comply with such terms, it shall not be lawful for the seizing officer to proceed to condemnation of the goods; but if not, that he may then so proceed. In pursuance of this power so vested in them, the commissioners have made an order, stating, that they are satisfied that no fraud was intended on the part of the masters or proprietors of the vessels seized, and that they have therefore ordered a restoration of the goods. For the seizing officer it is contended, that the commissioners have no power under the act to make such an order, without directing compensation to be made to him, and imposing terms on the proprietors for his indemnity and protection. But it appears to the Court, that though, if any terms had been imposed, they must have been complied with, yet that it is not necessarily incumbent on the commissioners to

engraft

engraft terms on their order for restoration. It is as a preliminary step to the enforcing of that order that the present application is made on the part of the Crown. Perhaps we should go too far to order the writ of appraisement to be quashed, and therefore our order will be, that all further proceedings on the writ of appraisement, and indenture of seizure be stayed.

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Rule absolute.

ROBINSON, Clerk, v. JERMYN and others.

Saturday,
7th May.

CASE for publishing a Libel.—The declaration stated, that before and at the time, &c. there was a certain room at *Southwold*, called the *Cassino*, frequented by certain proprietors thereof and subscribers thereto, and other persons, under and subject to certain regulations. That plaintiff before and at, &c. was officiating minister of the parish of *Blyford* in said county. Yet said defendants, well knowing, &c. but contriving, and maliciously intending to insult, injure, degrade, and vilify the said plaintiff, so being such minister as *aforesaid*, and to cause it to be suspected and believed that plaintiff was a person unfit to be associated with by the said proprietors and subscribers of the said *Cassino*, and other persons, theretofore, &c. at, &c. in one of the written regulations of the said *Cassino*, relating to the said plaintiff and another, wickedly, &c. published of and concerning said plaintiff, the following

These words
"The Rev.
John Robin-
son, and Mr.
James Robin-
son, inhab-
itants of this
town, not
being persons
that the pro-
prietors and
annual sub-
scribers think
it proper to
associate with,
are excluded
this room."
Published by
posting a pa-
per on which
they were
written, pur-
porting to be
a regulation
of a particular
society, held
not to be a
libel.

false,

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and others.

false, scandalous, malicious, and defamatory libel, as follows; that is to say, "the Rev. *John Robinson*" (meaning the said *John*), "and Mr. *James Robinson*" (meaning, &c.), "inhabitants of this town, not being "persons that the proprietors or annual subscribers" (meaning the aforesaid proprietors and subscribers to the said Cassino) "think it proper to associate "with, are excluded this room" (meaning, &c.) There were three other counts, varying the publication. To this declaration the defendant pleaded the general issue, and four pleas of justification, to which the plaintiff demurred. Joinder in demurrer.

Abbott, in support of the demurrer, adverted to the causes of demurrer assigned, which he described as being rather of substance than of form; but suggested, that the defendants would probably rely rather on the insufficiency of the declaration than on the validity of their pleas; and admitted, that if the declaration did not shew actionable matter, it would be unnecessary to go further into the pleadings. Arguing therefore as if this were a demurrer to the declaration, the present question, though coming before the court in this shape, is whether the words laid in the declaration constitute such a libel as would support an action; and he contended, on the authority of *Thorley v. Lord Kerry* (*b*), and the cases there cited, that they would. The defendants, by the terms of the written regulation of the club, exhibit the plaintiffs as persons, in their opinion, unfit to associate with, and therefore declare them excluded the Cassino. By that case,

(*b*) 4 *Taunt.* 355.

though

though some of those which were cited there, were found fault with for the largeness of the rule, it was decided that an action might be maintained for written slander, though it could not be supported by the same words being spoken; therefore liberty may be taken to argue that these words being written are actionable, even though they might not be so had they been merely spoken, *Villers v. Monsley (c)*. And many of the cases of slander proceed on the special prejudice of exclusion from society, one of the most severe afflictions in civilized life. The libel in this case announces the plaintiffs as persons unfit to be associated with.

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Clerk,
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and others.

[*Chief Baron.* By these defendants.]

The words are the same in substance and effect as if they had been more general. It is true, here is no particular cause or reason assigned; but that does not extenuate the calumny, because it leaves it open to aggravation by the force of imagination. The reason given might perhaps have been trivial; but where there is none, we are left at liberty to conceive the most degrading imputations that fancy can suggest. But whatever they might have thought, they had no right to publish their opinion.

Storks, contrà. The libel supposed to be couched in these words is said to consist materially in their ambiguity, and the cases quoted to shew them to be libellous are cases of direct and express charge, all of which are calculated to render their

(c) 2 Wilson, 403.

object

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object an exile from society. But I contend that the innocence of these expressions is to be found in their ambiguity. It merely appears, that a certain number of individuals did not think the plaintiff a proper person for them to associate with, but for what reason does not appear. It might even be a compliment to the plaintiff; at least he might have been excluded because this society were conscious that they might have given him offence, as a clergyman, if he had been admitted among them; they might themselves have been immoral characters. In the case of *Thorley* and Lord *Kerry*, which has been quoted for the plaintiff, the libel there consisted of direct and express allegations, charging the plaintiff in the original cause, with hypocrisy, malice, uncharitableness, and falsehood; and even there, the Chief Justice Mansfield, in delivering the opinion of the court, reluctantly admitted, that he was bound by the cases to recognize the distinction between written and oral slander, and that an action might be maintained for words written, which if spoken, would not support it; but declared, that if the matter were then first to be decided, he should have had no hesitation in saying, that no action lay for written scandal which could not be maintained for the words if they had been spoken. The court will not extend the catalogue of authorities by which that ill-received distinction is established, by pronouncing these ambiguous words to amount to the offence of libel, or hold that the circumstance of their being written will assist the plaintiff in this action. In the case of *The King v. Hart*, the prosecutrix (*d*), who was a

(*d*) 1 Bl. 386.

quaker,

quaker, after having been admonished by the society for frequenting balls and concerts, was at length expelled. The reason entered in their books was, "for not practising the duty of self-^{"denial,"} which was signed by the defendant their clerk. He was found guilty; but the judge was dissatisfied with the verdict, and the Court granted a new trial, without a rule to shew cause. That case is much stronger than this. But it is contended that these words should not have been published. No society could subsist if such a publication as this were not allowed; and I may therefore call it a privileged publication. Nor is it the inevitable consequence of this alleged libel, that the plaintiff is rendered infamous, contemptible, or ridiculous. The declaration avers, that plaintiff was a clergyman, and therefore avers too much, as nothing certainly in these words specially affects the plaintiff in his clerical character. It is admitted there is no objection to these pleas in point of form. And in this justification it is not necessary to state particulars, as the declaration has already sufficiently done so. But here is no imputation to be justified; the words do not affect the plaintiff's moral character; nor is there any inuendo in the declaration, by which it has been attempted to be charged that they do; and from that omission we may well infer, that the pleader who drew it could find none that might be ascribed to the words laid.

Abbott, in reply. The defendants have done what the Court will not allow libellers to do. It cannot be

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be supposed that this libel meant to suggest, that the defendants were immoral characters; such a construction is inconsistent with the averment in the declaration. The rule is, that libels must be read by the court in the common acceptation of the words. This room is not confined to individuals, but used by the proprietors and subscribers, and others, and therefore open in some measure to the public. The words published here are such as may probably affect the plaintiffs reputation. They are capable of injurious consequences, and may produce the effect attributed to them by this declaration, and that is sufficient to support the present action. As to the case of *The King v. Hart*, there the delivery was to herself, and no malice could be imputed to that publication.

THOMSON, *Chief Baron*. The demurrer to these pleas involves the material question, whether the publication of the words laid in the declaration is properly the subject matter of an action, and whether, under the circumstances, they amount to a libel. The words are, "The Rev. John Robinson and " Mr. James Robinson, not being persons that the " proprietors or annual subscribers think it proper " to associate with, are excluded this room." It seems to me to be a material allegation in this declaration that the plaintiff was officiating minister, but there is certainly nothing affecting him in his clerical character in these words. It then goes on to state, that the words were published in one of the written regulations of the room. Now the principal

principal ground on which this action can be supported, is, that it does in substance contain an averment, that these plaintiffs were not fit for common association—that they were not proper persons for general society; and nothing will help this declaration, unless it can be collected from it, that such an insinuation was the object of the words. Now it does not seem to me, that such an imputation can be inferred. It seems merely that these defendants did not think that the plaintiffs were proper persons to be associated with by them; but that may proceed from other causes than such as must appear on the face of the declaration, to have been insinuated, to constitute a libel. There might be reasons assigned not at all affecting the moral character of the plaintiffs; for the defendants may not have thought them agreeable or sociable. They may have considered them troublesome and officious; or, for some other such reasons, improper for their society.

It has been argued, that there is a very material distinction between written and verbal slander; and that words which, if merely spoken, would not be actionable, may become so by being written. Undoubtedly there are old cases, which have been allowed to go so far, on which subsequent modern decisions have been founded, though with some reluctance. The case of *Thorley v. Lord Kerry* has been cited. In that case there were unequivocal expressions of bad character used; but it does not appear that the words laid in this declaration are sufficient to shew the world at large, that even the inference necessary to support this action can be

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collected from them, that is, that they were improper persons for general association. And as there is no impeachment of the plaintiff's moral character, I think, therefore, that there should be judgment for the defendants.

GRAHAM, Baron. I cannot agree to extend the doctrine, of words being libellous in writing, which are not so in speech. It should, in all cases, be clearly shown that the words, which are the subject matter of action, contain a libel. The court have hesitated, where terms have been, at the time of their being used, incapable of definite meaning, to pronounce them actionable until they had acquired a sense intelligible to common understanding. Though words conveying dark insinuations should not be suffered to escape, they must in all cases admit of a clear and obvious sense: and it is a rule, that the declaration should in such cases help them out by inuendo. The pleader was puzzled here to frame any inuendo on these words.

It is not enough that the consequences of words uttered be probably injurious to character, if the terms do not shew such probability to the court. And as I can fix on no precise imputation arising from these terms, I think we should be going too far to set up such words as these, as sufficient subject matter of actions for libel.

Wood, Baron. I am of the same opinion with my Lord Chief Baron and my Brother Graham.

Great stress has been laid by Mr. Abbott on the intent to injure the plaintiff in the opinion of the words, and to represent him as a person altogether unfit for society.

society. But all these words mean nothing definite, and the question now before us is, whether this is a libel? Undoubtedly not: unless some imputation appear. If an imputation be expressly charged by words, it would be sufficient to state the words. If they are ambiguous, an inuendo is necessary, or some special averment. Mr. Abbott admits, that if they had said, that they had excluded him the room, and no more, it would not have supported his case. And yet that would equally have insinuated that they had some good reason for so doing; and if those words are not libellous these are not; for there is here no imputation on the plaintiffs, further than that these defendants do not think them proper persons for their society: and there may be many sufficient reasons why they might not be proper for association, without any imputation on their moral character; and if any were intended, there should have been an inuendo laid; but the drawer of this declaration was aware that none could be inferred.

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RICHARDS, Baron, concurred.

Per Curiam,

JUDGMENT for the defendants.

MEMORANDUM:

The COURT, in consequence of the absence of parties, adjourned the causes in the peremptory order paper till Friday next; but ordered that in future they should be called on in course: and that if the parties did not attend they would be disposed of and struck out of the paper in succession.

Wednesday,
11th May.

Friday,
13th May.

Buying and selling horses with an avowed intention to take out a license, and become a dealer, sufficient to constitute a trading within the meaning of the bankrupt laws, however limited the trading, and though no license has been actually taken out; and the Court will grant a new trial after verdict found against evidence of those facts.

WRIGHT and another (Assignees of White)
v. BIRD.

THIS cause, which was an action of trover by the assignees of a bankrupt, was tried before Mr. *Baron Wood*, at the last Assizes for *Rutland*. The main question was, whether White, against whom a commission of bankrupt had issued, was a trader within the meaning of the bankrupt laws?

From the Judge's Report it appeared to have been proved, that until very recently before the issuing of the commission, White, the bankrupt, had always been a farmer: but that he had then first bought horses not calculated for the purposes of a farm, and sold them again, and had declared his intention to become a horsedealer, and take out a license; and that he had hired a person specially as his horse-dealing man. The jury were directed, that a farmer, as such, was not subject to the bankrupt laws; but that if White had bought horses with a view to profit by their sale, as a part of his means of gaining a livelihood, he had by so doing rendered himself liable. They found a verdict for the defendant.

A rule having been obtained for a new trial,

Reader, and *Shuttleworth*, now shewed cause. They submitted that this had been properly a question for the jury, to whom it had been left, and relied that the court would not now disturb their finding,

on

on the authority of *Stewart v. Ball* (*e*), a stronger case than the present, and the cases there cited. There the verdict in *Bartholomew v. Sherwood* (*f*) was called a strong finding, but the court nevertheless refused to disturb it, on the ground that it was a question properly left to a Jury, and one which ought to depend on their verdict. They adverted to the evidence of the supposed bankrupt having occasionally rode each of the horses so bought by him; that five horses were all that had been bought, of which two had been sold by the creditors; and contended, that though the quantum of dealing was immaterial, this could not be considered a trading at all, and that he could not be said to be a dealer in horses till he had taken out his license, which he had not done.

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Clarke, contra, contended, that White having declared his intention of becoming a dealer in horses, the only question was, whether he afterwards did so: and it is in evidence, that he hired *Chapman* as his horse-dealing man; that he called himself a horsedealer, and actually did purchase these nag-horses, and went with them in a string to serve a fair; and the reason of his having carried on the business no longer was, that his finances did not enable him, and he became a bankrupt. There is in this case then all that is necessary to constitute the trading, a holding himself forth to the public as a horsedealer, and a subsequent actual

(*e*) 2 N. R. 78.(*f*) *Patman v. Vaughan*, 1 T. R. in notis.

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dealing in horses ; therefore the case of *Stewart v. Ball* does not apply here, for there the main point was that Wright had not publicly represented himself as a general dealer in the articles which he was proved to have bought and sold. In this case the jury were intimidated by the position assumed by the plaintiff's counsel *in terrorem*, that if the defendant was within the meaning of the bankrupt laws, either of themselves, or any other person who bought a horse and sold it again, would by so doing subject himself to be made a bankrupt.

THOMSON, *Chief Baron*. The extent of the dealing is not material, provided the party sets up as an avowed trader. The evidence is, according to *Claridge*, that White bought horses not proper for farming purposes : then he hired Chapman as his horse-dealing man, and told him he had ordered a license to deal in horses, which no farmer does ; but soon afterwards he became bankrupt. We often see, sitting in another capacity, that horse-dealers occasionally ride horses intended by them for sale. There must be a new trial, with costs of course.

Rule made absolute.

The KING v. ELLIS.

Saturday,
14th May.

SCIRE FACIAS on bond to the Crown, in double the value of the duties mentioned in the condition, conditioned to pay the duties of excise charged and chargeable on a certain quantity of brandy imported by defendant, and lodged in the warehouse of the *London Dock Company*, by virtue of the home-consumption act, before the said goods should be taken out of the warehouse; “*and in case the said goods should not be so taken out for home consumption on payment of the duties, or for exportation within one year from the date of bond, that the obligors should at the end of the said year pay the said duties, and all charges that might be incurred by the officers of Excise in respect of the said goods.*” Plea, Payment before the said goods were taken out of the warehouse, and before the issuing of the writ of *Scire Facias*, but after the expiration of the said year, of all said duties and charges before that time incurred by the officers of excise, and acceptance by the Crown in full discharge of the same. Replication, negativing payment of the full amount of the said duties within the year, and acceptance in discharge: and averring, that at the end of the year, further charges to the amount of 50*l.* had been incurred by the officers of excise in respect of the said goods. Demurrer and joinder.

To *Scire Facias* on bond to the Crown for Excise duties, Plea of payment, after day, but before writ issued, and acceptance by the Crown in satisfaction, held insufficient. King not bound by the 4th of Anne.

Spankie insisted that the plea in bar amounted in effect to accord and satisfaction, and was effectual

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at common law: and if not, that it was a good plea under the statute of the 4th of *Anne*. This is not the case of a sum of money due by deed, requiring a defeasance of commensurate authority, and to which a plea of payment after the day would be bad; nor is it a debt constituted by the writing itself. This is not a mere money bond, where the debt becomes due on the day mentioned, but an obligation to pay certain duties, on certain events, as soon as the amount should be ascertained, to which this is a good plea, since by the statute of *Anne*, payment before action brought may be pleaded in bar; and if payment merely were not sufficient, the subsequent acceptance on the part of the Crown must obviate all objections which might have been raised. In *Blake's* case (g) such a plea was resolved to be good when no certain duty accrues by the deed, but by subsequent default. Then the question arises, whether the king is bound by the statute, not being named: On principle he is; and in the case of *the Attorney General v. Allgood* (h), the Chief Baron, in considering the clauses of this act, on which the application for leave to plead several matters was founded, said, that though it is a general rule that the king shall not be bound by statutes which do not name him, yet the rule has exceptions, and he is bound by all acts to suppress wrong or fraud, and to prevent the decay of religion, as in the case of 5 *Rep.* 14, where it was held, that leases from colleges to the queen were void. So in *Lord Berkeley's*

(g) 6 Coke's Rep. 43.

(h) Parker 5.

case,

case (*i*), where the statute of Westminster 2d was held to bind the king, and the other cases there enumerated. In *Bartlett's* case (*k*), it was held, that the bond of collector of customs did not extend to a new duty subsequently imposed on coals, where the same collector had a deputation from the commissioners. On principle, if this plea were not allowed in cases where the king sued, the remedy intended by the statute would be frustrated; which was, that parties might plead without being driven into equity. It should therefore be construed more especially to bind the king, who can not be carried into equity. By the 38th clause of the warehousing act (*l*), it is provided, that goods bonded under it shall not be given out till the duties thereon are paid. The bond in these cases is merely given, lest the goods warehoused should become not worth the duties, when the obligor would never take them away; for if the goods are damaged the duty must still be paid. But here, it is now attempted to recover surplus duties from the defendant, beyond what he had originally stipulated to pay. If in such a case between private persons, this plea would be good, it should on general principle be allowed against the king, because it is adapted to the suppression of that wrong which would result from giving an undue advantage to the Crown by excluding the subject from the benefit of the statute.

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(i) *Plowd.* 236, 237. (l) 43 Geo. 3, ch. 132.

(k) *Parker* 277.

Walton,

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Walton, contra, stated, that the goods in question had been suffered to remain in the warehouse after the end of the year. On 10th May 1811, the Commons resolved, that all brandy then imported should pay a duty of 10*l.* per cent. more than the then existing duties; and that the defendant immediately, and before that resolution had passed into a law, went and took away the goods on paying the duties mentioned in the bond. He insisted therefore that the defendant was liable on the bond for the augmented duties. The condition had been broken by non-payment of the sum due on the day, and therefore the bond had become single, and could not be avoided but by pleading a release. *Noyes v. Hopgood (m)*. There is one point which distinguishes this case. The words of the statute are, "Where an action of debt is brought, on any bond which hath a defeasance to make void the same on payment of a *lesser* sum. Now here the duties might have amounted to the full penalty of the bond, and therefore the statute does not apply.

THOMSON, *Chief Baron*. It is plain that in this case the Crown is not bound by the statute. It is clear that if the duties were not paid by the end of the year, the bond became single, and therefore the subsequent payment of the duties imposed on the goods, after the expiration of the year, did not amount to satisfaction of the obligation. The plea does not allege the sum paid, to have been accepted in lieu of all penalties; and it was incumbent on the defendant to have pleaded a release. The Crown is therefore entitled to judgment.

(m) Cro. Jac. 649, and an anonymous case, Cro. Eliz. 46.

GRAHAM, *Baron*, of same opinion.

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WOOD, *Baron*. This is a bad plea. The duties were to have been paid within the year, and payment after the end of the year is no satisfactory answer to the bond. Taking into consideration all the other parts of the statute, it is clear that it does not generally extend to the Crown, but only in particular instances.

RICHARDS, *Baron*, assenting,

JUDGMENT for the Crown.

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COMPTON v. RICHARDS.

Tuesday,
May 17th.

CASE for obstructing Window Lights.—This cause was tried before Mr. Baron GRAHAM at the last assizes for Gloucester, when he directed a nonsuit to be entered, with leave to apply to the court to set it aside, and enter a verdict for the plaintiff, with nominal damages.

It appeared from the evidence at the trial, that the house which was the cause of action, was one of a range of buildings at Clifton, called the *Royal York Crescent*. The crescent had been begun to be built on speculation in 1791. In 1793 the builder failed, and the undertaking was discontinued. In 1804, the premises were purchased by Government for barracks, but that

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Occupier of one of two 16—356 houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window-lights by adding to his own building, however short the previous period of enjoyment by the plaintiff.

It is sufficient that the plaintiff declare on his possession, and that he has sustained a wrong.

design

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design was abandoned, and they were put up to sale by public auction in 1809, under certain printed conditions, when a part was sold. The remainder was sold in lots in 1810. Mr. Auriol then became the purchaser of the house, No. 13, (lot. 38.) and the defendant, of the house, No. 14, (lot. 39). On the 28th *October 1812* *Auriol* granted a lease of the house which he had bought, to the plaintiff, for a term of twenty-one years. A plan of the Crescent was produced at the sale.

By the 8th condition of sale it was stipulated,
 " That the several messuages or dwelling houses,
 " areas in front of each house, paved terrace, car-
 " riage-road, and void ground, should be imme-
 " diately laid out and formed at the expense of the
 " purchasers, in such manner as laid down in the
 " plan, and elevation of the same: and that there
 " should be no coach-house, stable, or other build-
 " ing, on the north side exceeding 20 feet in height,
 " nor any shops or dwelling houses erected on the
 " said gardens; and the whole to be completed
 " within two years from the day of sale."

After the expiration of the two years so limited for the completion of the buildings, &c. the defendant erected an additional room at the back or north side of his house, one side of which room was formed by carrying up his part of the wall which separated the gardens behind; and it appeared, that that wall had been so built as to incline, (as it extended,) from the defendant's garden, towards that of the plaintiff, and formed therefore an acute angle with the back of his house.

The

The present action had been brought for the damages which were alleged to have been the effect of this building, by having diminished the previous portion of light admitted by the plaintiff's windows ; and the result at *Nisi Prius* was as has been stated.

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Abbott, on behalf of plaintiff, having obtained a rule early in the term, on the principle of the determinations in *Palmer v. Fletcher*(*n*), and *Cox v. Matthews*(*o*) :

Dauncey, and *Fuller*, this day shewed cause ; contending that the plaintiff had no right to damages in the present case at all, or if he had, that he had mistaken the proper course of pursuing his remedy. For though they admitted that such a building might have excluded a ray of light, they denied that the facts in evidence were such as would support this action. They admitted that it might not be necessary to lay the windows as ancient, and acknowledged, that cases had determined that twenty years possession would give a right of action ; but submitted, that some period of previous enjoyment, however short, must be shewn by a plaintiff claiming that right, which could not be done here. For these houses were but of two years standing, and were both built, and had been carrying up nearly together ; and it was immaterial which had been finished first, if when bought neither was complete. It became necessary therefore to shew some

(*n*) 1 Lev. 122.

(*o*) 1 Vent. 137.

breach

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breach of agreement, or other special cause of action, accruing to the plaintiff to entitle him to a verdict, which had not been done. No special agreement existed, and if it did, it has not been declared on. It has been said, that the defendant was restricted by the 8th condition of sale, but a restriction from building houses on the garden does not extend to restrain him from merely adding to his own. The reason of that restriction is obvious, it was inserted to exclude unpleasant trades, and habitations, from the spaces appointed for garden-ground ; and the restriction does not apply to the size of the house.

But let us suppose that instead of a room he had built a higher wall only, would it have been contended, that that would have given a right of action ? certainly not ; for the defendant was entitled to build a wall by the conditions, and according to the plan ; and yet if a derogation from the former light is the injury complained of, and not the building, that injury would have been the same if he had carried up the garden-wall merely, which he was entitled to raise to any height he thought proper.

[*Wood, Baron.* Is the height of the garden-wall not specified in the plan ?]

It is merely a ground-plan ; and the wall is described by a ground-line only. It is the wall then, not the room, which obstructs ; and if this wall does not give them a right of action, the other three interior walls, which form this sleeping-room, certainly cannot.

[*Chief*

[*Chief Baron.* Were the garden-walls built at the time of sale?]

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It is not in evidence that they were.

[*RICHARDS, Baron.* The condition calls it void ground.]

And under that condition what prevents our building a wall; and if a wall, why not a room? It is plain that *Auriol* did not consider himself so restricted, by his having so considerably added to that part of this range of buildings, called the *Giff-ton Hotel*. But admitting that this were within the condition, it would then have been a breach of covenant, and this is not the form of action calculated to redress that wrong; and the general way of framing this declaration is argument, that something has been done from which we were not restricted.

Two cases have been cited in support of this motion. The first is *Palmer v. Fletcher*, reported in *Levinsz.* That was the case of a person, who having land, built on it, and afterwards sold the remainder of the land; and it was holden, that no person claiming the land under the original builder could obstruct the lights of the original building any more than the builder himself, who could not derogate from his grant. But there the purchaser derived title from the landlord who had already built, and here both houses had been begun at the same time. In the other case, *Cox v. Matthews*, it was held, that though the declaration did

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not state the house to be *antiquum messuagium*, it was notwithstanding good; and there it appeared that the defendant had built a house, and let it to the plaintiff, and was then about to stop up the lights. So if a mill be newly erected on a stream, it may not be necessary to call it *antiquum molendinum*; but that case only goes to shew, that the owner of land cannot divert a stream running through it, on which a mill has been erected below, unless he had been in the habit of diverting it before. But here there was no such length, or modus of enjoyment as to preclude the defendant from completing his house as he pleased, or to give the plaintiff a right of action; inasmuch as both houses had been actually begun by the same person before they came into possession of either the plaintiff or the defendant; and who could say how far one or the other were restricted from completing his house as best suited his own convenience. If either were restricted, it must have been by some express agreement; and that being a special ground of action, cannot be pursued by this general form of declaring for consequential injury, which would render the defendant, if it could be supported, liable to a twofold suit; by the tenant, for obstructing his lights, and by the covenantee, for a breach of the conditions.

Abbott, and *Richardson*, in support of the rule, stated the declaration to be in the common form, and that the windows were not laid as ancient: that the conditions and plan were produced for the purpose

purpose of shewing how these houses were to be finished, and to mark the boundaries between one property and another. By these it appeared that the wall behind the plaintiff's house was not at right angles with the back of it, but advanced somewhat before it, so that a building on the wall must more effectually annoy the occupier. The windows, their situation and number, as intended to be appropriated to each house, were exhibited by the plan, and might have been seen at the time of the sale. There was a description of what was to be sold, and the question would be, what use could be made of the purchase?

The time when these buildings were to be finally completed, that is, within two years from the day of sale, is very material to be considered; because Dr. Compton had sustained an injury by any building, after he had, according to the conditions, a right to conclude that all that was to have been done, had been done. The day of sale was the 20th of *January* 1810. The lease to Dr. Compton bears date 28th *October* 1812, which was after the two years within which these buildings were to have been completed; and the erection complained of by *this* declaration was made in the summer of 1813. Now having shewn that the rights of these parties were ascertained and determined, at the time of the sale, by the conditions, the plan, and the then state of the buildings to be sold; it may be submitted that if such rights were infringed it would become the subject of an action within the principle of *Palmer's* case, where, though it does not appear by the report how long the house had

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been occupied, yet the occupation was certainly recent, and there it was held, that no person should be at liberty to derogate from the rights of a purchaser. This was not a piece of void ground, but an unfinished house, where the openings which were to have afforded the enjoyment of light were visible. At the time of the sale the rights of both parties were clearly pointed out by the common vendor.

[*Chief Baron.* And that was certainly tantamount to an express agreement that such rights should not be obstructed.]

So we contend; and that no person can derogate from the enjoyment of such a right but by special agreement for so doing, with the person entitled to permit such derogation.

To a question by the Court, It was answered, that the spaces intended for the back windows were actually opened in the walls, at the time of the sale. It cannot be material, therefore, whether the houses were finished or not, provided it is shewn that the exterior had been sufficiently completed to exhibit to a purchaser whatever he would be entitled to enjoy, and was to expect for his purchase. There is no real difference between this case and that of *Palmer & Fletcher*; and if we bring ourselves within that case, we establish a right of action.

It has been said, that another form of action should have been pursued for breach of the condition, but we

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we do not rely on the condition as a contract, but merely as shewing the meaning of the parties. And supposing, that covenant might be brought by the party contracting, we have also a right of action for the injury which is the consequence of breach of that contract. It is said, that this is not a building of a dwelling-house, but only an adding to one already built; but surely no lawyer out of argument would contend that an addition to a previous building, which covered a void spot, was not a building on that spot. Then it is attempted to be argued, that they had a right to build a wall between the gardens of what height they pleased; and that the wall, and not the room, was the cause of the injury complained of; and that argument certainly appeared to have great weight with the court: but though the line of wall does not express the intended height, it is evident that it was to have been a mere garden-wall, and therefore it should only have been built of a reasonable height for such a purpose; and every builder can describe, and the law will take notice of, what must be considered such a reasonable height. The building by *Auriol* is no answer to this case, because an action might have been brought against him. At the time of the sale the rights of every purchaser were designated. The parties were then informed of the accompanying benefits to be enjoyed by them, and the infringement of those rights by any one of them would therefore give a right of action.

THOMSON, *Chief Baron.* When this question was last before the court, I own I had very considerable

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derable doubts on my mind as to the plaintiff's right ; but the arguments I have heard to-day have satisfied me that this action may be well maintained. This purchase must be taken to have been subject to certain conditions at the time of sale, and as these unfinished houses were at that time so far built, as that the openings, which were intended to be supplied with windows were sufficiently visible as they then stood, we must recognise an implied condition that nothing would afterwards be done, by which those windows might be obstructed. And the purchasers must have taken, subject to what then appeared.

The case of *Palmer & Fletcher* is strong and clear, and has been often quoted ; and the effect of that case is, that where a man sells a house, he shall not afterwards be permitted to disturb the rights which appertain to it ; and the windows of this house being opened at that time, necessarily imported their subsequent non-obstruction.

Now, without questioning whether this building were a dwelling-house or not, it is sufficient for the purpose of maintaining this action, if the erecting of any building on the wall be the doing an act whereby the plaintiff has sustained a derogation of any right which he acquired by his purchase. If so, it is what the original owner could not have done, and all lessees claiming under him were equally bound by the transfer.

It is sufficient that the plaintiff declare on his possession,

possession, and that he had sustained a wrong. The conditions amounted to an agreement between the parties.

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GRAHAM, Baron. This cause originally appeared to me as being one of great novelty, and therefore I considered it a proper subject for discussion here. We must take it, that all parties bought with a view to the same plan of enjoyment. Though I was struck with the argument, that the height to which the walls were to be carried had been omitted in the conditions and plan, I was certainly satisfied with the answer, that just ground of complaint would arise, if they exceeded what might fairly have been understood to be the meaning of all parties at the time of the sale. From the plan we may infer that the height of the walls was to be regulated by mutual convenience. And neither party, consistently with that understanding, should raise his wall so high as to interrupt the light of the other. But when this gentleman has a further object in view than merely a garden-wall, he then without doubt passes the limitation of his just right. The next question is, whether the plaintiff has sustained an injury; and certainly he has; for he might be placed in a well, if his neighbours on each side should carry their building to a sufficient extent. The enjoyment of possession here has not been long, it is true; but I think that no matter, under the circumstances of this contract. I am also of opinion that the action has been properly brought in point of form.

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Wood, *Baron*. I think the present action is maintainable, and that the form is right. The contract entered into is immaterial, as it makes no difference whether the plaintiff claims by prescription or by grant, the form would be the same either way. I consider Dr. Compton claiming here a right by grant; and when this house was granted to *Auriol* he became grantee of every thing necessary to its enjoyment, as much as if it had been said at the time, that no one should obstruct the light which it then enjoyed. Now what is the case here? The defendant has built a wall which obstructs the plaintiff's light.

RICHARDS, *Baron*, expressed himself of the same opinion.

Rule made absolute.

DOE *dem.* NAYLOR *v.* STEPHENS.

Tuesday,
17th May.

Omission in
the memorial
of the names
of witnesses
to the execu-
tion by the
trustees of a
grant of free-
hold estates, to

THE lessor of the plaintiff was grantee of an annuity of 600*l.* for three lives, in consideration of 6,000*l.* secured by bond, and a grant, and surrender of the freehold, and copyhold estates which were the subject of the present ejectment. The deed bore date 22d March 1811, and was expressed to

secure an annuity, held no objection to the memorial, provided the deed was in fact executed by the trustees, and in the presence of the witnesses who attested the execution of the several *cessuus que trust*, and such execution and attestation appear accordingly on referring to the deed.

Nor is it necessary that the admittance on surrender of copyholds be memorialized, although the surrenderee were admitted immediately on the surrender.

be

be made between *Theodore Gwinnett* and *Benjamin Newmarch* of first part; *Abel Smith*, a trustee for said *B. Newmarch* and *T. Gwinnett*, as to part of the freehold hereditaments thereinafter described, of second part; *Charles Newmarch*, also trustee for said *B. Newmarch* and *T. Gwinnett*, of third part; *John Allenby Forrest*, a trustee for said *B. Newmarch* and *T. Gwinnett*, as to the copyhold lands thereinafter described, of fourth part; and *Richard Naylor*, the lessor of the plaintiff, of the fifth part.

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Deo deo.
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v.
STEPHENS
and another.

It appeared by the memorial of this deed, that *Smith*, *Forrest*, and *C. Newmarch*, were Trustees of the legal estate of the premises demised and conveyed by the deed, for *Gwinnett* and *B. Newmarch*, and that a surrender of the copyhold took place on the day of the execution of the deed by some of the parties. And it stated it to have been executed by *Gwinnett* and *B. Newmarch*, in the presence of *Samuel Ricketts* and *Thomas Hodges*, taking no notice of the execution of the deed by *Forrest*, *Smith*, and *C. Newmarch*, the trustees, although it was so executed, in fact, and was attested by the same witnesses as being executed by all the parties.

Two quarters of the annuity being in arrear, the present ejectment had been brought to recover the premises; and, on the trial of the cause, the jury, under the direction of the judge, found a verdict for the plaintiff.

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Deo dem.
NAYLOR
v.
STEPHENS
and another.

A rule was obtained by *Jervis* for a new trial, on the ground of the memorial being insufficient to satisfy the 17th of Geo. III.—Because, first, it took no notice of an important part of the security, namely, the admittance on the surrender of the copyholds, which took place at the same time with, and formed part of, the surrender; and, secondly, that if that should not be held necessary, the memorial was also deficient, in having omitted to state the execution of the deed by the trustees, in whom the legal estate was; so that it might have appeared on the face of it, that the legal estate had been conveyed; and cited *Hart & Lovelace* (p); *Mackreth's case* (q); and *Horton & Knight* (r); against which Rule,

May 13.

Dauncey and Abbott, now shewed cause.—The formalities of the 17th of Geo. III. have been substantially complied with. This deed has been duly enrolled in Chancery, and the memorial contains all that it is necessary it should contain for the purpose of notoriety, which was the object of that act: The names of all the parties—for whom any of them are trustees—and the names of all the witnesses.

The memorial runs thus, “ And which said bond, “ as to the due execution thereof by the said *B. Newmarch* and *Theodore Gwinnett* and which “ said indenture, as to the due execution thereof, “ by the said *B. Newmarch*, and *T. Gwinnett* and “ *Richard Naylor*, are respectively witnessed by “ *Samuel Ricketts* and *Thomas Hedges*.”

(p) 6 Term Rep. 471.

(q) 2 East. 562.

(r) 3 Bos. & P. 153.

Now

Now it is argued, that it is not stated that they are witnesses to the execution of the deed by the trustees, so that under colour of objecting, that all the witnesses are not named, it is attempted to object, that it is not stated in the memorial what it was that the witnesses did attest. But in point of fact the trustees did execute, and these are the witnesses who did attest that execution; and so it appears by reference to the deed. And these are all the witnesses who attested. There are no other to the execution of this deed by any party. Therefore it would be too much to object here, that it is not particularly specified in this memorial what the witnesses attested, nor is that required by the act; and the subsequent statute of 53 Geo. III. ch. 141, has in fact explained what the Legislature contemplated in passing the 17th, by subjoining a form of such a memorial as is required; we have therefore complied with the letter and spirit of the act.

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Doe dem.
Naylor
v.
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and another.

As to the cases cited: In *Hart v. Lovelace* the memorial stated, that all the instruments were attested by *A. B. &c.* or one of them, and that was held bad for the uncertainty with which the witnesses were described. In *ex parte Mackreth*, it was stated in the memorial, "that the said bond, warrant of " attorney, and deed-poll, are witnessed by *J. J. Powell* and *J. Bowles*, *R. Pitches*, and *T. Constable*." There the objection was, that it must be taken from the memorial, that all those four instruments were witnessed by those four persons, whereas three of them were only witnessed by two persons. The statement there was untrue, and on that

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NAYLORv.
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that ground the court decided that the memorial was insufficient. Each of those cases therefore are distinguishable from that now before the court, where there is neither uncertainty or untruth. The case of *Horton & Knight* alone is applicable to the present. That was an application to set aside a judgment entered up on a warrant of attorney for securing an annuity. There the indenture was in fact executed by *Knight, Ford*, and *Orton*, parties, but the memorial stated it to have been executed by *Knight* and *Orton* only, omitting *Ford*, who did in point of fact execute. And the court were of opinion that the act had been complied with. So here the names of the trustees are omitted, but they did execute the deed, and the witnesses named in this memorial attested the execution.

As to the necessity of memorializing the admittance, that is not such an instrument or other assurance as comes within the meaning of the act. The statute says, every deed, bond, instrument or other assurance, the subsequent general words must be construed to have reference to the previous particulars enumerated. The act requires the execution, the date, and names of witnesses, attesting to be set forth in the memorial, an admittance being incapable of execution, date or attestation, cannot therefore be within the act.

[*GRAHAM, Baron.* An admittance may not have taken place within the twenty days, and then it could not have been memorialized.]

It might not; and the consequence would be,
that

that a supplemental memorial would be in all such cases necessary. In the case of *Sherson v. Oxlade* (s), where one of the securities was a warrant of attorney, on which judgment had been entered up prior to the enrolment, the question was, whether that judgment was one of the assurances intended by the statute to be enrolled, and the court held that it was not.

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and another.

Jervis, and *Taunton*, *contra*, contended that the admittance was a necessary part of the assurance by surrender, for that till admittance nothing passes from the surrenderor: Until admittance surrenderee can not maintain ejectment, and admittance, on a second surrender, will in law defeat a former surrender without admittance, even for valuable consideration, whatever might be the case in equity. If surrenderor dies before admittance the estate descends to his heirs. Admittance therefore being so important a part of the assurance of surrender, as such it ought to have been enrolled; and it is a material fact, that in this case the surrender and admittance were contemporaneous. The case of *Sherson & Oxlade* is entirely different from this. That was the case of an *executory security*; and it does not follow, because a judgment may be entered upon a warrant of attorney that it necessarily must or will.

Then as to the second point, of the necessity of the names of all the witnesses attesting the execution of the deed appearing in the memorial.

(s) 4 Term Rep. 824.

The

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The word execution must refer to all the parties. There are here three distinct descriptions of persons, all of whom should be shewn to have executed, and the witnesses names who attested the execution by each, should appear. Now this memorial does not state the names of the witnesses to the execution of this deed by the trustees, or that it was executed by them at all. And it is not sufficient that recourse might be had to the instrument itself, for the act intended that the memorial should be a faithful exhibit of the whole transaction, and that as such it might obviate the necessity of any inquiry *aliunde* the memorial itself. This memorial is not sufficiently explicit; it only states that the deed was executed by the grantor and grantee, and not by the trustees in whom the legal estate was, and therefore it is so far calculated to mislead; on the faith of it these defendants have resisted this ejectment; and they were justified in concluding from it that the plaintiff could not recover. The case *ex parte Mackreth* is not, as is contended, in favour of the plaintiff, inasmuch as it is not untrue that the four deeds were witnessed by the four witnesses, for, *reddendo singula singulis*, the fact might be so; but the proposition deducible from that case is, that the legislature intended it should appear, which particular deed the particular witnesses attested: In the case of *Orton v. Knight, Ford*, whose name was omitted in the memorial as having executed, was merely a surety for *Knight* the principal; but in this case the trustees are an essential party to the grant.

Cur. adv. Vult.

THOMSON, *Chief Baron*, now gave judgment. Having stated the case: This question involves the title of the lessor of the plaintiff, who is the grantee of an annuity, secured by grant of the estates, which are the subject of this ejectment.

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The defence set up, is the invalidity of the memorial of the securities required by the 17th of Geo. III. ch. 26. The objections which have been taken to it are twofold:

The first is, that the names of all the witnesses have not been enrolled:

The other is, that the admittance which took place on the surrender of the copyholds, does not appear in the memorial: and therefore it is contended that the lessor of the plaintiff is not entitled to recover in this ejectment.

The first objection depended on the form of the memorial itself, wherein it is stated "which said indenture as to the due execution thereof by the said *B. Newmarch*, and *Theodore Gwinnett* and " *Richard Naylor*, are respectively witnessed by " *Samuel Ricketts* and *Thomas Hedges*;" the fact being, that though it thus appears to have been attested by these witnesses, as to the execution by some of the parties only; yet on reference to the instrument, it is found to have been executed by all the parties; and that these subscribing witnesses attested their execution, and are the only witnesses attesting the execution by any of those parties.

In

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and another.

In support of the objection, a case *ex parte Mackreth* is cited, where four witnesses were described as having attested the execution of four distinct instruments; and it was objected, that it must be taken to mean that the execution of each instrument was attested by the four subscribing witnesses; but that differs materially from the present case; for there, it appeared that three of the instruments were witnessed by only two of those persons; here, on production of the deed, it appears to be executed by all the parties, in the presence of the witnesses named in the memorial. Then the case of *Hart and Lovelace* is cited, and there the objection was, that the instruments were stated to have been attested by and executed in the presence of *W. D.* and *W. M.* or one of them; and we might easily anticipate the opinion of the court in that case.

In support of the memorial, the case of *Orton and Knight* is very strong and conclusive; there the name of one of the parties, *Joseph Ford*, was omitted in the memorial as having executed the deed, but it stated all the persons who were subscribing witnesses to the deed; and the Court were of opinion that the act had been complied with. There seems no objection to the memorial then, on the ground of all the witnesses attesting the execution of the deed not being named.

The principal objection is, that the admittance has not been introduced into the memorial. The admittance is contended to be an assurance, and much

much learning has been brought forward to shew that till admittance the estate remains in the surrendor, and that after admittance it relates back to the time of the surrender. But the question is, what species of assurance the act had in view; and it seems to have contemplated every instrument whereby the grantor became fettered. Now admittance is an act proceeding from the grantee, and the very strong case quoted of *Sherson and Oxlade* applies forcibly to this objection. There it was contended, that the judgment entered up on the warrant of attorney was an assurance which ought to have been registered under the act; but the court decided that not to be one of the assurances intended by the act to be enrolled; that the contract for the annuity was made by giving the bond and warrant of attorney to enter up judgment; so here, I say, the contract was made by granting the surrender. Lord Kenyon goes on to say, "those were the securities on which the party relied, and the act is complied with by registering all the securities given by the parties. This will sufficiently answer the purpose of notoriety, for every person will see by referring to the memorial, that the party was at liberty to enter up judgment whenever he pleased." So here, every person sees by the memorial that there was a surrender, and that therefore the surrendor had a right to be admitted. He then says, that "whether a matter shall or shall not be registered cannot depend on any act which is to be done afterwards." In that case, till judgment had been entered up the estates could not be affected by the warrant of attorney. There seems to be no distinction

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1814. distinction between these cases, and therefore this memorial must be taken to contain every thing required by the act ; and if so, there can be no objection to the plaintiff's recovering. Our opinion therefore is, that the rule for a new trial ought to be discharged.

Rule discharged.

In the matter of the ship LUCIA MARGARETHA,
Wednesday,
11th May.

The Court will set aside condemnation of the subject of seizure after the expiration of the usual time of fourteen days allowed for entering claim, on satisfactory affidavit of merits.

SEIZURE of a vessel, laden with wine, brandy, and almonds, on her arrival at Falmouth, beyond the period of her license.

Scarlett had obtained a Rule, on the affidavit of *Frederick Jolly*, calling on the collector of Customs for the port of Falmouth to shew cause why the judgment of condemnation entered herein should not be set aside, on payment of costs. The affidavit stated that the vessel sailed with license for four months, from the 26th of September 1812; but that in consequence of meeting with damage at sea, she was not afterwards able to sail again within the time limited by the license, and did not therefore arrive at Falmouth till the 16th of January 1814, and on the 19th of the same month was seized by the officer. That the Lords of the Treasury were memorialized on the 10th of February, praying that the cargo might be permitted to entry, which was refused ; when

when another memorial was presented, praying to be allowed to reload the said cargo, and carry it under British convoy to Bremen, which was allowed, and that directions to that effect were accordingly given by the Commissioners of the Customs, who ordered a release of the said ship and cargo, but that the collector refused to comply with the order, on the ground that judgment of condemnation had been entered in this court, for want of a claim being put in within fourteen days from the return day of the writ of appraisement. That such proceeding to judgment of condemnation was without the knowledge of deponent, and, as he believes, of *Joseph Louis Ratten*, the memorials being then under consideration of the Lords of the Treasury, who had, by their orders of 17th September, and 14th October, 1813, directed that no vessels under similar circumstances should be proceeded against, to condemnation, till their Lordships had the particulars of each case before them; that the writ of appraisement was issued on the 9th of February, 1813, while the ship was lying at Falmouth, and was made returnable on the 12th, and that judgment of condemnation was entered on the 2d of March, the day on which the order of restoration was granted, and that in consequence of the refusal of the seizing officer to release the ship and cargo, a further petition was presented to the Lords of the Treasury, who have since directed that their former order should be carried into effect, and that a writ of delivery should be issued to restore the goods.

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The affidavits on the part of the seizing officer stated, that expecting the arrival of vessels from France under the assumed character of Prussians, he caused the vessel in question to be examined and admeasured; when he found that the term of the license produced had expired; that the amount of her tonnage (one of the best criteria of identity) differed materially from what was specified in the license; and that the master's name there was *Lebb*, and not *Deane*; and that therefore he detained her, and reported it to the Commissioners of the Customs, who directed their solicitor to proceed to her condemnation, and that he received a writ of appraisement in consequence, with the knowledge and privity, as deponent believes, of the agent of *Ratten*, the claimant, and that he suspected her papers were simulated.

Abbott, and *Brougham*, shewed cause, and objected to the affidavit on which the motion was founded, as not being made by *Ratten* the owner of the vessel, as they contended it should have been, but by *Jolly*, who, it did not appear, could have been sufficiently acquainted with the facts, and who had not set forth any *merits*. They insisted that the claim of the owners of the vessel should have been put in before the expiration of the fourteen days, which was the usual period allowed, as *Ratten* knew, having done so, as it appeared by the affidavit of the officer, on a former similar occasion. They stated also from that affidavit, that the ship's size and tonnage, and the name of her master,
B
did

did not correspond with the description in the license.

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Scarlett, and Littledale, contra, denied that *Jolly* was a stranger ; he was a partner in the vessel ; nor could he have had reason to think that the officer would have proceeded to the extremity of condemning the ship, in defiance of the order of the Treasury adverted to in the affidavit, which protected her, during the consideration of the memorial of her owners by the Commissioners. This was a license not only to trade with the enemy, but to bring home the produce of France in a Prussian bottom ; and by modern decisions, if there be no fraud, an adventure is not illegal, although the vessel's license be in point of fact expired. And Lord *Ellenborough* has frequently held, that the license in all such cases, where no fraud appears, still protected the vessel. Here the Board of Treasury and the Board of Customs had been satisfied that there was no fraud, or breach of the navigation laws, and therefore no ground for condemnation. The delay has been well accounted for by *Jolly*, who swears to merits. The objection of the claim not having been entered within the fourteen days, is obviated by the fact of the claimant being at that time in communication with the Treasury, which removes all ground of want of due appraisal of the steps intended to be taken on the part of the claimant, and he had obtained two Treasury letters directing restoration. The difference in amount of tonnage is no criterion of the non-identity of the vessel. British and Prussian admeasurement may

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not correspond. The change of master is still less so. The only legal ground of seizure, fraud on the part of the owners of the ship, failing them, we are entitled to be admitted to put in our claim, notwithstanding the condemnation.

The COURT having taken time to look into the affidavits;

THOMSON, *Chief Baron*, this day gave judgment.—After stating the substance of the affidavits on both sides.—This application is made to the discretion of the Court, to permit the owners of this vessel to enter their claim, notwithstanding the proceedings which have been taken: and that can only now be done by our interference to set aside the condemnation. The parties opposing that interference have not put enough before the Court to induce it to withhold the favor that has been sought, or to prevent this going before the proper authority to decide whether these claimants are entitled to the property. The neglect of putting in the claim within the usual period of fourteen days, appears to have been reasonably enough accounted for; because their application to the Treasury was at that time under consideration; and during that interval it might have been supposed that the officer would not have proceeded. But in the mean time the condemnation did take place. Otherwise the claim must have been put in, in due time. The other objections are perhaps not much more than matter of *civil*. On all the circumstances of this case, the Court are inclined to indulge the claimant, by putting

putting him in a situation to enter his claim ; 1814.
 Therefore the condemnation must be set aside on
 payment of the costs of that proceeding, and of
 this application. The claim to be perfected in In the matter
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 fourteen days, and no action to be brought against
 the seizing officer.

Rule absolute.

DAVIES v. CONNOP.

Wednesday
May 18.

TROVER for Wheat and Straw.—This cause came on to be tried at the last Hereford Assizes, when it was submitted by *Jervis* and *Campbell* for the defendant, that trover could not be supported by the facts of this case, and that the form of action should have been trespass, or ejectment, and an action for mesne profits ; they cited *Boraston v. Green* (*t*), and *Wallace v. King* (*u*).

Trover lies for corn cut by an out-going tenant after the expiration of his term, though sown by him before that time, under the notion of being entitled to an away-going crop.

The facts were these : the plaintiff entered into an agreement with defendant, dated the 4th of March, 1806, to let him the Snail's Croft, Lower Field, and Lower Park Meadow, for seven years, from Candlemas preceding, at 26*l. per annum.*

In the last year of his term the defendant sowed about a third part of the arable land with wheat, conceiving, as he said, that he was entitled to an off-going crop.

(*t*) 16 East. p. 71.

(*u*) 1 H. Bl. 13.

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At

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At the expiration of the defendant's term, Candlemas 1813, the plaintiff let the same lands to *Joseph Skidmore*, by parol, reserving the crop of wheat, and *Skidmore* took possession of all the land, except that on which the corn was sown, which he was not to have till the crop was carried away.

On the 25th of Aug. 1813, the plaintiff sent some reapers to cut the wheat, but after having cut some part of the field, the defendant came and turned them off the land, and on the next day sent in his own reapers, and cut and carried away the whole of the corn. To recover which, the present action of trover had been brought.

Mr. *Baron GRAHAM* directed the jury to find the amount of damages, giving the defendant leave to move.

A rule *nisi* having been granted,

Dawney, and *Abbott*, now shewed cause.—This action is maintainable upon the plain and general principles of law. The action of trover is, in form, a fiction merely. Where there is property the law annexes possession, and therefore it is that an executor may bring trover for goods, of which he has never in fact had actual possession, nor is it necessary that he should prove the goods ever having been in his possession.

[*Wood, Baron.* Is there not an act of parliament enabling executors so to proceed?]

There

There is an act which gives executors a right to maintain trespass (*x*); but their action of trover is not dependent on that statute. And that action of trespass is given where the wrong was sustained in the life-time of the testator. But the principal difficulty in this case is, whether the plaintiff had such a possession as to entitle him to declare, as he has done on this record.

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In *Gordon v. Harper* (*y*), it is said by Mr. Justice Lawrence, that it had been long in doubt previous to the decision in *Berry v. Herd* (*z*), whether a lessor had such a possession of timber cut down, pending a lease, as would support trover; but that by that case it was finally determined that he had; and that as soon as a tree was cut down the interest of the lessee in it was determined. So if one cut down corn growing on my land, though I have a remedy by trespass *quare clausum fregit*, yet if it be carried away, trover also lies, because when severed it is then in me. Here, at all events, the property was not in the defendant, but in the plaintiff, and possession follows the property. The defendant had quitted possession at Candlemas, and he had no pretence to retain it after that time. *Taunton v. Costar* (*a*). The case of *Boraston* and *Green* does not apply. In that case there was a specific contract, which destroyed the custom under which the right to an away-going crop was claimed. It also differs from this, as it was an action brought by the in-coming tenant, and not the landlord, who was there held to be the proper plaintiff, having a remedy on the covenant or agreement. It is ad-

(*x*) 4 Ed. 3. c. 7.

(*z*) *Palm.* 327. *Cro. Car.* 242.

(*y*) 7 Term Rep. 13.

(*a*) 7 Term Rep. 431.

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mitted here that the defendant had no right under any supposed custom. Neither the corn nor the land was rightfully in his possession ; and the landlord took possession of the land by sending reapers to cut the corn. If the outgoing tenant had a right, by custom, to an away-going crop, he would then only have had a qualified possession of the land for the mere purpose of taking that crop away.

Jervis, and *Campbell*, in support of the rule, admitted that the defendant was bound to have quitted at Candlemas, 1813, and that he was not entitled to an away-going crop ; but contended that in point of fact he had not then given up the possession of that part of the land which he had sown with wheat, in Michaelmas 1812, when he was tenant of it, and had a right to do so. That was a circumstance mainly relied on by one of the judges in the case of *Boraston & Green*, who considered that the possession of the off-going tenant continued as to that part of the land on which the crop was growing. In *Bevan v. Delahay* (b), the tenancy was held to subsist beyond six months after the expiration of the term, so as to give the landlord a right to distrain on an off-going crop. It has been said, that the sending persons to reap by *Skidmore* on behalf of *Davies* was taking possession of the land ; but it was nothing like taking possession ; nor does possession follow the property, as is shewn by their own case of *Gordon v. Harper*, where it was held, that the furniture of the ready-furnished house, which had been let, was not in the possession of the landlord, in whom the property was, but of the tenant, whose possession was

(b) 1 Hen. Bl. 5.

not

not qualified, but absolute. The right of possession is the question between us, and therefore it is that trover is not the proper form of action here ; for the title to land cannot be tried by such an action. The case of trees severed, bears no analogy to the present. Trees are never in possession of a lessee, who can have nothing in them, but the convenience of shade and shelter whilst they are standing, which is determined the instant they are cut down.

[*GRAHAM, Baron.* But what difference is there between trees severed, and corn reduced into the possession of the landlord by severance ?]

The distinction is, that the corn here was sown by the tenant, having a right to the land, and consequently to the produce, to which the ownership of land does not extend, as it does in the case of trees and mines. But we deny that he had ever given up possession of this part of the land ; therefore, he had not merely a conditional license ; he always retained the absolute possession. In *Boraston v. Green*, Mr. Justice *Bailey* makes two strong points.

[*Chief Baron.* The result of that case is, that the in-coming tenant could maintain no action at all ; it should have been brought by the landlord.]

Lord *Ellenborough* adverts to the plaintiff's action there, and says it should have been trespass, *quare clausum fregit*, to try the defendant's title to enter upon the land and take the profits.

[*Chief Baron.* The landlord may bring trover against a stranger for carrying away trees, though the land be out of his possession ; and this being a reserved crop, approaches that case.]

His

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His right to reserve the crop will depend on his right to the corn. The defendant must be considered here as holding over after notice to quit. The consequence of allowing trover to be brought in cases like the present, would be to annihilate the action of ejectment.

Cur. adv. Vult.

May 23.

THOMSON, *Chief Baron*, now delivered the judgment of the Court. This cause, which was tried before my brother *Graham*, was an action of trover for wheat in straw; and the short facts appear to be, that the defendant had been tenant to the plaintiff under a term which was expired; and that he had been served with notice to quit at that time. There is no objection made to the regularity of the notice. In Autumn 1812, after receiving notice, and before quitting possession, he sowed part of the land, three acres, part of a close of five acres and a fraction, with wheat, having, as is admitted, no right to what is called an away-going crop, and his lease expiring at Candlemas 1813. It seems, for so I collect from brother *Graham's* report, that he gave up all the rest of the land, except this part which he had so sown with wheat. He had been told, however, that if he sowed, he would have no right to reap, though that was certainly not necessary. The plaintiff then let this land to one *Skidmore*, reserving the corn growing on these three acres, that the in-coming tenant might not be involved in a law-suit with the old occupier.

The summer before, the plaintiff had sent some labourers into the field for the purpose of weeding the

the corn, and had thereby exercised an act of ownership. In harvest time 1813, he sent reapers to cut the corn, who proceeded to cut a part of the field, when they were interrupted by the defendant, and the plaintiff wisely yielded to prevent mischievous consequences. It ended in defendant cutting the remainder, and carrying the whole away, as well what had been cut by the plaintiff, as that which was afterwards cut by himself; and it is to recover that corn that the present action is brought. I stated, he had no claim or colour of right to the land, and so it is admitted; but it is contended, that the plaintiff cannot maintain trover under the circumstances, but that he should have brought ejectment, and an action for mesne profits; on the other side, they say he had a right to cut the corn, and that the whole when severed either by himself or the defendant, became his property. The question therefore is, whether the plaintiff had such right and possession as will enable him to support this action of trover. The case of *Taunton & Costar* is in point. That was replevin for taking cattle, avowing a demise of the *locus in quo* to one *Jackson*, and by him to the defendant for a year, and so from year to year as long as both parties pleased; by virtue of which the defendant entered and was possessed at the time of distraining plaintiff's cattle, damage-feasant. The plea in bar was, that before the demise to the defendant, *Jackson*'s executors sold the residue of the term to the plaintiff, who determined the demise to the defendant by notice to quit; after which the plaintiff entered into the *locus in quo*, and put his cattle therein. The replication was, that the defendant

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fendant did not give up possession in pursuance of the notice. And so the defendant might have said here. To that replication there was a general demurrer: but Lord *Kenyon* held the case too plain for argument. His words are, "Here is a tenant from year to year, whose term expired on a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought it is clear the landlord might have justified under a plea of *liberum tenementum*:"—and so might the landlord have done here. Lord *Kenyon* then goes on, "If indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry, 'but there can be no doubt of his right to enter upon the land at the expiration of his term.'" Taking this therefore to be a crop growing upon the land, whether cut by the defendant or a stranger not being in possession, the moment it was severed, it became the property of the plaintiff. Then as to the landlord having a right to distrain after the expiration of the term, the case of *Bevan v. Delahay* has been cited, but that does not seem to bear at all upon the question here. I also lay out of my consideration, at present, the case of *Boraston & Green*, as one which cannot be said to apply. In that case, the main point was, whether the lease controlled the custom; and the Court held that such a specific agreement destroyed the operation of an implied contract under the alleged custom. In the case of *Gordon & Harper*, which was trover against the

the sheriff for having taken, under an execution against the tenant, the furniture of a ready-furnished house let to him by the plaintiff, what the Court went on there, was, the concurrence of the right of property, with the right of possession ; and it was held that the landlord had not the right of possession during the tenant's term. But in that case, supposing the sheriff had come in and taken those goods, under an execution against the tenant, only one day after the tenant's right had expired, the form of action would then have been good. We think there is no sufficient objection to the plaintiff's recovering in this action : therefore the

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Rule must be discharged.

MORGAN v. BIDGOOD.

Friday,
20th May.

OWEN having, on a former day, moved for costs for not proceeding to trial in this cause, now applied for judgment as in the case of a nonsuit (c).

Costs for not proceeding to trial and judgment, as in case of a nonsuit, may both be moved for separately, and in that order, but not otherwise.

Hughes, opposing the application, insisted that though such a motion as the former might be made in the Court of King's Bench, where costs are not

(c) The one being a rule absolute in the first instance, and the other a rule *nisi*, the advantage of this practice of moving is sufficiently obvious. The costs on the former motion are to be paid immediately on taxation, whatever may be the event of the action.

given

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given in such cases unless a separate application be made for them, yet that it had never yet been in point of practice recognized by this Court that both these motions might be made, and therefore could not be done in the present instance. *Guy v. Wilkinson* (*d*). *Ogle v. Moffit* (*e*).

THOMSON, *Chief Baron*. The meaning of the act (*f*) is, that the defendant should be put in the same situation as if the plaintiff had proceeded to trial and been nonsuited.

Rule granted.

Monday
May 23.

Defendant brought to the bar of the Court for contempt in not putting in his answer, being an infant, the Court on suggestion of his infancy, will assign him a guardian, and discharge him.

Defendant may be brought up on any day in term.

WILSON v. BOTT.

THE defendant was brought up by habeas corpus from Leicester gaol, on an attachment for want of his answer; and *Hughes* now moved that he might be charged with the bill for the first time. The defendant being put to the bar, it was sufficiently obvious that he was an infant, and the Court inquired into the circumstances of his case. It appeared that he had married a woman possessed of some property, who was also under age, and that the present bill had been filed by some of her relatives against the husband and wife. The Court were struck with the novelty of the peculiar situation of the parties, and hesitated for some time, considering what would be the proper mode of proceeding, to adopt.

(*d*) Barnes 314.

(*e*) *Ibid.* 316. See *Tidd's Practice*, p. 773.

(*f*) 14 Geo. II. ch. 17.

They

They regretted that the defendant had been brought up on the last day of the term; and the attorney suggesting that he had considered it contrary to the practice to bring him up before, the Court declared that he might, consistently with the practice, have been brought up on any day in the term.

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After some deliberation, it was at length moved by *Hughes*, on the part of the plaintiff, by the direction of the Court, on suggestion that the defendant was an infant, that one of the clerks in Court might be assigned his guardian, and that he should put in his answer by such guardian. And it was ordered that Mr. *Thompson* should be assigned his guardian, and that the defendant should be discharged out of custody (g).

(g) Same day. *Batson v. Maybey*. On the motion of Mr. *Hall* for the plaintiff, that the appearance of the defendant, brought to the bar of the Court by writ of habeas corpus, directed to the Sheriff of Dorsetshire, may be entered, and that the defendant may be committed to the Fleet, charged with his contempt, and with the several causes mentioned in the Sheriff's return.

Writ of habeas corpus being read;

It was ordered that Mr. *Thomson* do record defendant's appearance in the proper book, and that he be committed, &c.

THE END OF EASTER TERM.

REPORTS

R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER.

TRINITY TERM,—54 GEO. III.

Thursday
June 16.

GORDON v. TREVELYAN.

The Court will not decree a specific performance of an agreement for a lease to be collected from letters where there is no definite term expressed for which the lease was to be granted, nor any reference *aliunde*, by which it might be ascertained. But *semel* otherwise if the letters had been more explicit, or had afforded any criterion for defining the object of the parties.

lease.

lease. He then received the following letter:—
 “ 22 Sept. 1802. My dear Sir, soon after I sent my kind letter of remembrance of you, I was informed by *George and John Babbage*, and also *Charter*, that the full value of *Slade, per annum*, was 50*l.* therefore immediately said that I would take no more of you, going on in other respects as usual, as to the outgoings, &c. but as to superseding you in preference of any other person it never entered my head. *John Babbage* will this day acquaint your man *Robert Lary* with the same, that no time may be lost in consequence of *Mr. Hind's* over valuation, from which I took the hint, not knowing at the time I wrote to you but it was right.” Which plaintiff immediately answered, expressing himself satisfied with the rent of 50*l.* and desiring to have a lease on the same plan with those usually granted to his other tenants. Defendant's reply:—“ 4th Oct. 1802. My dear Sir, I am glad to find by your letter of the 30th ult. that you think the rise of *Slade* very fair and proper, as you desire a lease on the same plan with my other tenants; you shall certainly have one; but how is *Mr. Leigh* to make it out who is unacquainted with the nature of such lease, or why am I not to employ my own steward, who has acted for me these thirty years? your answer of course must be upon the plea of delay; and should it be the case, you have no great reason to fear my taking advantage of you in any transaction, as my conduct will speak for itself both as to *Middleton* and *Slade*; and in the latter case I take less rent than you offered. I think you might have saved

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yourself four or five guineas, or what Mr. *Charter* usually takes of tenants, but at all events you shall have one in the usual way, where the landlord stands to repairs, as to having delivery of timber, respecting gates and stiles, and taking upon himself the land-tax."

Charging that at the time of writing the letters defendant was in the habit of granting leases for fourteen years, determinable at the end of the first seven; that plaintiff was ignorant of defendant having granted any leases for a shorter term, and that he was entitled to have had a lease executed to him of the said farm for fourteen years, from *Michaelmas* 1802; that defendant had commenced an action of ejectment, and threatened to proceed and sue out execution, unless, &c. Prayed specific performance and injunction.

The answer admitted the letters, but denied that they referred to a term of fourteen years, and set forth the letter of the plaintiff in answer to the defendant's last, and submitted it amounted to a waiver of the lease; and stated, that the leases usually granted by the defendant were generally only similar in point of covenants, but differed in the duration of the terms, some being for seven, others for ten, and others for fourteen years.

The Plaintiff then wrote again, "7 October 1802. I am this moment favoured with yours of the 4th inst. and thank you for so readily agreeing with my proposals. Nevertheless, I fall into your opinion; that a lease for *Slade* is needless; I am therefore satisfied in renting the farm of you without one.

Allow me to assure you, that no part of your conduct towards me, or any other man living, could lead to the slightest suspicion of your word, which I ever did, and ever shall, look upon as sacred as my own."

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Dauncey, Tripp, and Courtenay, now shewed cause against dissolving the injunction, and contended that the letters put in amounted to an agreement for a lease, and that plaintiff held under the increased rent only in confidence of the expected term.

Martin, Shadwell, and Clason, in support of the order, insisted that the defendant's letters were incapable of such a construction, and that the plaintiff's letter of the 7th of October, at all events amounted to a waiver of a lease. There is no term mentioned in these letters, and it is impossible they should be construed to amount to such an agreement for a lease as the Court will decree a specific performance of, by compelling Sir *John* to execute a lease for fourteen years, without a word of any covenants or conditions to be observed on the part of the tenant. Sir *John* constantly proposes to the tenant to hold on as usual, and that was at will. But even if he should be held bound to grant a lease, it could not be for more than seven years, reference to this usual mode of leasing will not furnish a definite term; all his leases are for different periods. If he had had a lease, he was to have given fifty guineas a year; and all the cases of a decree of specific performance, by reference, have some means pointed out by which the term and necessary covenants may be

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ascertained. The principal difficulty is as to the duration of the term, and the plaintiff has refused the lease which would have defined the term. Now he has received notice to quit for having cross-cropped the land ; and it is a rule in the court of chancery, that if the court see that there is any stipulation in the agreement which in a lease would have amounted to a covenant, and would have created a forfeiture if broken, they will not interfere, if it has been infringed. The notice in this case was given long after the expiration of the first seven years.

THOMSON, *Chief Baron.* It seems to me, that if we were to continue this injunction we should be giving a greater interest to the plaintiff, than any construction which he could himself put on these letters as an agreement would warrant; for twelve years are now expired since the time when they were written, and the cause would probably not come on to be heard finally till two years more. But setting that consideration aside, the question is, whether any agreement can be made out from the letters, and the circumstances under which they were written. It will be material to consider the previous relation which subsisted between the parties; *Gordon* had been for many years the tenant of *Sir John Trevelyan* without lease. Shortly before this correspondence *Sir John* had directed a valuation of his farms, and this had been estimated at a higher rent than the tenant then paid. It was advanced from 40*l.* to 70*l.* but that advance was not accompanied with any offer of a lease. It appears that a proposal

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posal was made by the plaintiff to pay 50 guineas a year under a lease, and it then remained to be settled on what terms. The defendant afterwards finding the farm had been too highly estimated, a handsome proposal is then made by him to continue the plaintiff as his tenant, at a rent of 50*L* going on as usual in other respects, and paying the usual outgoings, and declaring that to supersede plaintiff never entered his head. A letter seems to have been afterwards written to him by *Gordon*, which is not now extant, to which *Sir John* wrote an answer, expressing himself glad to find that plaintiff considers the rise of the farm fair; and complies with his desire to have a lease on the same plan with his other tenants, not at all alluding to any term of years. It seems that it had been proposed, that the lease should be prepared by some professional person; and *Sir John Trevelyan* asks, why his own steward, who was better acquainted with the nature of his leases, should not be employed on the occasion, by which money would be saved. On the 7th of October a letter is written by the plaintiff to this effect:—I fall into your opinion that a lease is needless, and I am satisfied to rent the farm of you without one, which finally determines all communication between these parties. Here is then no precise agreement, on reference to any one of *Sir John Trevelyan's* leases in particular, by which the term and conditions might be furnished; and the silence of these letters in those respects supplied. And it appears that *Sir John's* tenants held under different terms. Many of his leases are for seven years, and some for fourteen, determinable at the expiration of the first seven;

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and I think in this neighbourhood there were only two farms held for the term of fourteen years, the term claimed by the present bill, and those were granted on the express reason of the tenants having incurred great expense in the improvement of their farms. These letters, therefore, are altogether too uncertain and indefinite ; nor is there any reference or allusion to which we may resort to explain the mutual intention of the parties. It must have been left to some subsequent treaty for the settlement of terms, and none appears to have been afterwards set on foot. In consequence of the defendant having taken offence about the mismanagement of the farm in 1813, with which, whether he was right or wrong, we have now nothing to do, he gave the plaintiff notice to quit, and on receiving that notice he files this bill. It seems to me, that to constitute an agreement for a lease, the ~~term~~ and conditions should either be actually expressed, or the treaty should bear some reference by which they might be ascertained, and that otherwise it is not an agreement of which a court of equity can decree a specific performance. There is no ground here for continuing the injunction, and I think it should be dissolved.

GRAHAM, Baron. I think on the whole the good sense of the question is with the reasons for the opinion of my Lord Chief Baron.

Wood, Baron. The principal difficulty which occurs to me, is in ascertaining the time for which the lease was to have been granted, and on that ground I concur with the Lord Chief Baron. By the

the letter of the 4th of October, the plan of defendant's other leases is alluded to; and though I think that the word plan means something more than term; yet how are we to ascertain from this plan, which is of itself not uniform, for what period the lease should have been granted. I agree, *id certum est quod certum reddi potest*, but we have no means of fixing what was the intended term.

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RICHARDS, Baron. If I could have found any subject to which I could refer for the term, I should then have thought we had enough to warrant us in continuing this injunction, for I think Sir John agreed with the plaintiff's proposal. From his letter Sir John seems to have thought it proper that his steward should have been employed in preparing the leases, as being more conversant with his usual mode than any other person could be, yet that means merely as to the conditions, and not as to the term; but, he says, at all events you shall have one in the usual way, and that is explained by the subsequent words. Then, if it is conceived there is a reference to the leases already granted, to which of them are we to refer, to ascertain the intended term to the leases for life, for one term of years or another? and if not to one in particular, how can we ascertain the term, when there are hardly any two persons who have the same; and it is impossible for a court of equity to decree a specific performance of an agreement for a lease, without having a precise term, expressly or by reference, for which it is to be granted; and it would be cruel

F 4 and

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and unjust to detain the plaintiff here, on a point which we think against him.

Injunction dissolved.

Saturday,
18 June.

A solicitor may proceed to tax his costs after verdict at law, notwithstanding an injunction to stay execution, with a view to commencing an action in his own name for the amount, after a final settlement between the parties, by arbitration, without his concurrence.

BROOKS v. BOURNE.
20 Decr 16th.

DAUNCEY moved, That the solicitor for the defendant in this cause should be at liberty to tax his costs in the suit at law between the parties, and proceed to recover the same, notwithstanding the injunction which had been obtained by the plaintiff (the defendant at law) in this court.

The affidavit of the solicitor, on which this was moved, stated, that he had commenced an action in the court of Common Pleas against the plaintiff in equity, at the suit of the defendant, to recover the sum of 140*l.* and in Hilary Term 1812, had obtained a verdict;—that the present injunction to restrain him from suing out execution, was obtained on the 6th of July following;—that on the 11th of September 1813, the defendant became bankrupt, when he and his assignees entered into an agreement with the plaintiff, without the knowledge of deponent, to refer all matters between them, both at law and in equity, to arbitration, and that each party should pay his own costs of suit at law.—That the arbitrators, by their award of the 24th of January, ordered the said sum of 140*l.* to be paid by the then surviving plaintiff to the assignees, with costs of the agreement and reference, and all other costs incidental

incidental thereto, to be taxed by the proper officer: —that the surviving plaintiff had paid the said sum of 140*l.* to the assignees, but had not paid deponent the costs due to him on the verdict, and that deponent had objected to the reference.

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v.
BOURNE.

Dancey urged, that the solicitor ought not to be thus precluded from recovering his costs by any such agreement as had been entered into between the parties to the suit.

Horne, contrà, insisted that this motion ought to be dismissed with costs; that it was incompatible with the practice of the Court, its object not being to dissolve the injunction, as it should have been, if further proceedings were intended to be pursued. The reference was by rule of court, and all dispute between the parties, both at law and in this court, had been determined by the award.

But the COURT allowed the motion; and intimated, that if an attachment should be moved for, on an action being brought to recover the costs in the solicitor's name, as it must be, on the ground of a breach of the injunction, the Court would consider it a distinct cause, and therefore would not grant the attachment.

1814.

Wednesday,
22 June.

CRUMP v. TAYLOR.

In the case of a bankrupt charged in execution, the Court will enlarge the time for his surrender in discharge of bail, notwithstanding the provision in the statute of 49 Geo. 3, permitting a bankrupt in custody in execution to be brought before the Commissioners.

J. PARKE had obtained a rule *nisi*, calling on the plaintiff to shew cause why the defendant should not have a fortnight after the 25th of June instant, to surrender in discharge of his bail, and that in the mean time all further proceedings should be stayed.

The affidavit of the defendant's attorney, on which this motion was made, stated that the defendant and the bail resided at Liverpool; that the defendant had lately been declared bankrupt; and that the 25th of June had been appointed for the last sitting, when the defendant was to surrender, and finish his examination.

It was alleged to be the practice of the other courts to allow such motions; and various orders made by judges at chambers to that effect were produced (o). And the cases of *Maude v. Jowett*, (p), and *Glendining v. Robinson* (q), were cited.

(o) *MOSLEY WOOLF v. WILLIAM TAYLOR*.—Upon hearing the attorneys or agents on both sides, I do order that the defendant have a fortnight after the 25th of June instant, to surrender himself, or be surrendered in discharge of his bail, the plaintiff being at liberty in the mean time to take such proceedings as he may be advised; but notwithstanding any such proceedings, the defendant's bail in this cause shall not be fixed in case the defendant be surrendered within the fortnight above mentioned.

7th of June 1814.

S. Le Blanc.

(p) 3 East. 145.

(q) 1 Taunt. 320.

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W. E. Taunton now shewed cause, and objected that the cases quoted did not furnish authority for the present application, because the rule moved for in *Maude & Jowett* had been then discharged, and subsequently went off by compromise. And the other had occurred in 1808, which was previous to the stat. of the 49 Geo. 3.; and that act having removed the inconveniences on which alone such indulgence could be granted, by permitting the bankrupt in custody in execution, to be brought before the Commissioners, had obviated the grounds on which similar applications must have been made. The Commissioners, and not the bankrupt, must have been the object of the indulgence of the Court, otherwise the bankrupt who has defrauded the greatest number of creditors will receive the greatest share of favour. In this case it is particularly unnecessary. The writ of *capias ad satisfacendum* was returnable the 22d of this month, and the *scire facias* may be made returnable on the 25th. By the practice of this Court, bail have four days after the return of the writ to surrender the principal, and they may therefore surrender the bankrupt in discharge of their recognizance on the 29th. And the bail residing at Liverpool, he is on the spot.

[*Chief Baron.* Have the bail a right to take the bankrupt while attending the commissioners?]

It would certainly be in contempt of the chancellor to take him from the commissioners; but immediately

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immediately on concluding his examination they may take him into their custody.

THOMSON, *Chief Baron.* That would be supposing the bankrupt's examination entirely concluded on the 25th, and that the bail apprehend him on the 26th, which will be on a Sunday. It sometimes happens that the last examination is adjourned. I had at first some doubt that the application was now necessary, since the 49 Geo. 3, ch. 121, but it appears to me that this case comes sufficiently within the reason of those where the same indulgence has been granted by the other courts. It must be taken, subject to the terms which have been usually imposed in such cases.

Rule absolute.

Wednesday,
22d June.

LANE v. HOWMAN.

Justification of a libel, that there was reason for thinking the imputation was true from what had been said, held bad on demurrer, unless it is stated what had been said, and by whom.

THIS was an action on the case, for writing and publishing a libel. The declaration stated, that the defendant, well knowing, &c. but contriving, &c. to cause it to be believed that the said plaintiff was guilty of feloniously receiving certain parchments, which the said plaintiff knew had been feloniously stolen from the said defendant; did write, compose, and publish, and cause, &c., in the form of a letter directed to one Mr. W. Godwin, at Mr. Yeates's office, attorney, Cheltenham, a certain libel, containing, &c. "Sir," (meaning, &c.) "Winchcomb,

April

April 23rd, 1813. I understand *J. Lane* has been with you, with an intent to get money from me for defaming his character. I never said he received the said parchment and conveyed it away, but there is great reason to think so from what *J. Peart's* sister has said, and the well-known character of *Lane* and *Peart*. If you think proper to proceed against me for what I have said, I shall defend it; but I would have you inquire the character of *Lane*, and *Peart* and his sisters. Am your humble servant, *J. Howman*.—Other counts for speaking defamatory words, whereby, &c. Plea, Not guilty—And

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Justification—Because, he says, that before and at, &c. there was very great reason to think from what *J. Peart's* sister had said, and the well-known character of the said plaintiff, that he the said plaintiff had received the said parchment, wherefore, &c.

Demurrer.—1st. For that the said defendant hath not set forth the reasons which induced him to think, &c. 2dly, Nor set forth what *J. Peart's* sister had said respecting the said plaintiff's having received the said parchment, nor in what the well-known character of the said plaintiff consisted, or of what crime or misconduct the said plaintiff had been guilty, so as to induce, &c. 3dly, Nor the causes which constituted his reasons for so thinking, &c. 4thly, That the alleged reason is set forth in so indefinite and uncertain a manner, that the said plaintiff cannot know or collect what the said defendant will attempt to

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to establish by evidence under them, or either of them, in order to support the charge of the said plaintiff's having, &c. 5th. General insufficiency. Joinder in demurrer.

Peake, in support of the causes of demurrer assigned, objected that the defendant had not, as was essential to his plea of justification, attempted to justify the whole of the libel, or brought forward any specific charge, or stated which of the sisters of *J. Peart*, who may have several, had so spoken of the plaintiff as to induce the belief of his having received the parchment. She should have been named. Earl of *Northampton*'s case (*r*). *Davis v. Lewis* (*s*). The object of requiring a more circumstantial and definite allegation in the plea of justification is, that it may give a plaintiff a right of action against the original slanderer. *Maitland v. Goldney* (*t*). But the principal objection is that the charge is too vague and general to enable the plaintiff to take issue on it. *Stile v. Nokes* (*u*). It is not sufficient in justificatory pleas to state general and indefinite charges of misconduct, but it is incumbent on a defendant to aver issuable facts. *I'Anson v. Steuart* (*x*). *Holmes v. Catesby*, (*y*). The justification does not go to the whole of the libel. The libel states, that "there is great reason to think he received the parchment, and carried it away," whereas the justification only says there is great reason to think he received the

(*r*) 12 Coke's Rep. 133.

(*u*) 7 East 492.

(*s*) 7 T. R. 17.

(*x*) 1 T. R. 748.

(*t*) 2 East. 426.

(*y*) 1 Taunt. 543.

parchment,

parchment, which is altogether a distinct charge

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from carrying it away.

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Abbott, contra, contended that the libel as laid in the declaration was not sufficient to maintain the action, because the writing was not of itself in the nature of a libel. By the introductory part of the declaration it is charged that the parchments had been stolen; and the libel is stated to have been published in the form of a letter to one *W. Goodwin*, at Mr. *Yeates*'s office, who in point of fact was clerk to the attorney who had previously threatened to bring an action against the defendant for having spoken the words laid in this declaration.

[*Chief Baron.* Does that appear upon the record?]

It does not, but it is to be collected from the terms of the letter. The letter contains no express charge, but merely a suspicion, for which it assigns certain reasons. One of the distinctions in *Com. Dig.* Tit. "*Action for Defamation*," is, that if the words do not import a certain charge, they are not actionable, as "*Thou deservest to be hanged*," for they denote only the opinion of the speaker. Here the defendant says merely that there is reason to think it, and therefore it is not the subject of an action, and if not actionable in words it is not so in writing. It is not the manner, but the matter, which must constitute the gist of the action. It will be for the Jury to fix these inuendos. Then the question is,

whether

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whether the justification is sufficient. In *Maitland & Goldney*, the libel set forth that *Goldney* had said so. Now there may have been reason here, from what had been said to the defendant, to induce him to think that the plaintiff had received the parchment, without making it necessary for him to state what had been said, or who it was that said it. And in *Stiles & Noakes*, the account of the proceedings was there so interwoven with the comments, that the case could not have been answered but by shewing what the evidence was on the trial. So in *I'Anson & Stuart* it did not appear what the acts were which warranted the expressions used, and the same in *Holmes & Catesby*.

Peake, about to reply, was stopped by the Court.

THOMSON, Chief Baron. It does not appear that the plaintiff knew what had been said. Unless it were shewn what *Peart's* sister had said, the plaintiff would be given no remedy against her.

GRAHAM, Baron. It is quite impossible that on this justification any action would lie against the original slanderer.

Abbott then moved for leave to amend his plea, which was granted, on payment of costs.

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CAMPBELL v. TWEMLOW.

Wednesday,
22d June.

THIS was an action of trespass, for entering the plaintiff's house and seizing his goods therein, which had been referred from the last assizes for Chester to *W. D. Evans*, Esq. barrister at law, who had by his award directed a verdict to be entered for the defendant.

In the course of the last term, *J. Parke* had obtained a rule *nisi* to set aside the award, on the ground of the arbitrator having refused to admit, on the part of the plaintiff, the evidence of a woman who had been for several years, and then was, cohabiting with him, and passed as his wife, whom the plaintiff would have tendered to prove that she was not actually married to him.

If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the Court will not interfere to set aside his award on that ground, although the party applying offer to pay all the previous costs incurred, considering the parties bound by his decision.

The point at least doubtful, whether a woman living with a man as his wife, and having children by him, be admissible evidence to prove the fact of her never having been actually married to him.

J. Williams and *D. F. Jones*, now shewed cause, and put in several affidavits in discharge of the rule. From these it appeared, that the plaintiff, for many years previous to his recent marriage with the person in whose right he claimed the house and goods in question, had lived with the rejected witness as her avowed husband, and had had several children by her;—that he had repeatedly conversed with various persons on the subject of the peculiar ceremony of their marriage, which he described as having taken place in the north of Ireland;—that in 1810, he was married at Congleton to the young woman whose property the subject of

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the late suit had been, with whom he remained only two days ; when having possessed himself of a considerable portion of her effects, he abandoned her, and went to Ireland with his previously reputed wife, who kept a public house there, continuing to use his name, and to represent herself as his wife, as before.

The arbitrator, on an application being made to him by the plaintiff to adjourn until this witness could be produced, inquired what she was to prove ; and being informed it was intended to disprove, by her evidence, her marriage with the plaintiff, refused to admit her testimony for that purpose.

It was now insisted, in support of the award, that under the circumstances of this case, the witness was incompetent to be examined on the part of the plaintiff, to prove that the reputed marriage had never actually taken place : or if that point of law should be otherwise ruled, yet, as all matters in dispute, both of law and of fact, had been voluntarily referred by both parties to the arbitrator, who was a barrister ; he having rejected the testimony of the witness, and decided on her incompetency, they were finally bound by his decision, whether it were right or wrong. To establish the first proposition, it was contended, that the principles on which the exclusion of a wife from giving testimony in favour of her husband was founded, were as strongly applicable to the instance of a woman cohabiting with a man as her husband,—by whom she was supported,—and to whom she had borne children ;

children; and that the latter was as completely within every reason of the matrimonial policy as the former, and should be equally subject to the rules of evidence built on those principles and those reasons. That the wife cannot in civil cases be called to give evidence for or against her husband is clear. *Rex v. Cliviger* (a). *Davis v. Dinwoody* (b). *Broughton v. Harper* (c). The only case at all inclining the other way is the *King v. Bramley* (d), and there Lord Kenyon said that such testimony was open to great observation. The consequence of admitting this woman to give evidence in favour of the plaintiff in this case, would be to afford the same advantage to her as arises to a wife examined on behalf of her husband; for she would be contributing to the augmentation of the fund by which she is at the moment supported, by as much as the amount of the damages which might be recovered in the action on the strength of her testimony. Now the main question is, whether such a person shall be permitted to give such evidence; she is, in point of fact, as fully under the control and influence of the plaintiff as if she were his wife; and their interests are identified as fully.

{*RICHARDS, Baron.* I remember a prosecution tried at Chester, before my Lord Kenyon, in 1782, at a time when he was perhaps in the zenith of his legal knowledge, wherein his Lordship sanctioned the doctrine of the inadmissibility of the evidence of a person in the situation of this witness. The prisoner in that case was tried on a charge, of

(a) 2 T. R. 263.

(c) Lord Raym. 752.

(b) 4 T. R. 678.

(d) 6 T. R. 330.

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forgery. Being a man of competent education, he addressed the Court in his defence with considerable effect. In the course of his speech he frequently alluded to a woman who then accompanied him, and whom he spoke of as his wife, and he concluded by offering her evidence in corroboration of some facts which he had stated. When the objection of her being his wife was taken, he said that they were not in fact married. But his Lordship would not permit him to call her, after having spoken of, and represented her as his wife. And he was convicted, and executed.]

The defendant's counsel then proceeded to contend, that at all events, if the law of their first position should fail them, the plaintiff was now concluded by the award, by which he had consented on full deliberation to be finally bound, and if so, relied that this would not be considered a case, where the Court would go out of its usual course, to interfere on behalf of the plaintiff against the honesty and equity of the case. *Deerly v. The Duchess of Mazarine (e). Burton v. Thompson (f). Cox v. Kitchin (g).* And in support of the second general proposition, they cited the cases of *Ching v. Ching (h). Ridout v. Pain (i),* and *Chase v. Westmore (k).* And they submitted further, that wherever a person, as here, holds himself out to the public as being in any particular circumstances or situation, an adverse party, pro-

(e) Salkeld 646.

(h) 6 Ves. 282.

(f) 2 Bur. 664.

(i) 3 Atkyns 486.

(g) 1 Bos. & Pull. 338, and
the cases there cited.

(k) 13 East. 357.

ceeding

ceeding in a court of law, on the faith of his being in fact what he has represented himself to be, will not be held to strict proof of his being actually in such circumstances and situation. And that on the other hand, he himself is estopped from denying, on any such proceeding, what he had so taught the public to believe. In *Radford v. Briggs* (*l*), the defendant had written up over his door, licensed to let post-horses, and that was held sufficient evidence against him in an action for the penalties incurred under the post-horse act, to dispense with producing the license. So in *Radford v. M'Intosh* (*m*), it was held not necessary to give in evidence the appointment of the farmer-general, the defendant having accounted with him as farmer.

In the case of *Robinson v. Mahon* (*n*), which was *assumpsit* for occupation of furnished apartments by defendant's wife, *Mahon* set up a former marriage, according to the Jewish ceremonies, to a woman then living. But Lord *Ellenborough* said that the defendant was estopped from setting up bigamy as a defence to the action; that he had given the woman who lodged with the plaintiff every appearance of being his wife, and by marrying a second wife while his first was still alive, he had done what he could to confer the rights of marriage on both, and had incurred a civil as well as criminal responsibility.

(*l*) 3 T. R. 637.

(*m*) *Ibid.* 638, and *Bevan v. Williams*, *in actis*.

(*n*) 2 *Camph.* 245.

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J. Parke, in support of the rule, urged that the Court could not be called on, to take into consideration what had been called the merits of this case, as the plaintiff was afforded, on this motion, no opportunity of answering the facts stated in the defendant's affidavit. All the cases which have been cited in resistance of this application, on the ground that the honesty and justice of the case were against the party applying for the interference of the Court, are cases of motions for new trials ; and there is this material distinction between those and the one now before the Court, which is to set aside an award. In moving for a new trial, the Court have all the facts which appeared in evidence at *Nisi Prius*, without partiality or prejudice from the report of the Judge who tried the cause ; but on a motion to set aside an award, they have only the party's own affidavit of his merits, and therefore, of course all that appears is entirely in favour of one side of the question only, so that those cases should not be allowed to have any influence on the present application. The principal point then is, whether the witness who has been refused was competent to give her testimony or not, and if she were, there could be no effectual or valid award made without hearing her evidence. At *Nisi Prius* she would have been examined on the *voir dire*, when she might have said that she was never married to the plaintiff, and was therefore not in fact his wife. Then nothing more could have been said. As to the estoppel,—in the case of *The King v. St. Peters* (o), it was expressly held

(o) *Bur. S. C.* 25.

that

that the supposed husband was a competent witness to disprove the marriage. And in *The King v. Bramley*, the appellants offered to produce *Sarah Ward*, to prove that she was never married, or that if she was, the ceremony took place in Ireland under such circumstances as by the laws of Ireland rendered it wholly void. Lord *Kenyon* held that her evidence was certainly admissible. In that case there was something like a marriage; and here, if there were any marriage at all, it must have taken place in Ireland, and it might have been also under such circumstances as rendered it void. In *Standen v. Standen* (*p*), it was decided that a man might be called to prove his supposed marriage illegal. And in *Ganer v. Lady Lanesborough* (*q*), Lord *Kenyon* admitted the plaintiff to give in evidence on a former marriage of the defendant's husband to a woman then living, to prove the second marriage null.

Cases have been quoted, on the other side, to shew that conduct is considered evidence of character, but they do not shew such evidence to be conclusive; it is merely *prima facie*, and may be rebutted by facts; and the object of the present application is, that the plaintiff may be permitted to have the facts of this case fully gone into, which, if the cause had proceeded to trial, he would still have been entitled to, in case he had been nonsuited in consequence of the witness not being then forthcoming. He is desirous that the case should

(*p*) *Peake N. P.* 32.

(*q*) *Ib.* 17.

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be decided on the merits, for the sake of his character; and he is willing that it should be made part of the rule that all the costs incurred shall first be paid by him. In the case of *Chase v. Westmore*, the question of law was the sole matter in dispute, here it was not; and there Lord *Ellenborough* says, it is impossible to lay down any general certain rule in what cases the Court will refuse to open an award. And in *Morgan v. Mather (r)*, Mr. Justice *Wilson*, sitting as *commissioner*, says, "I am of opinion, that when anything is submitted to arbitration the arbitrators can not award contrary to law, because that is beyond their power, for the parties intend to submit to them only the legal consequences of their transactions and engagements."

THOMSON, Chief Baron. In the view I have taken of this case, it does not seem to me to be necessary that the Court should give any opinion, whether the witness rejected by the arbitrator was competent to be examined or not. Every thing, both of law and in fact, must in this instance have been referred to the arbitrator. He has adjudged the case; and he has decided on not calling this woman, who was tendered as evidence on the part of the plaintiff,—whom he had represented as his wife for so long a time,—with whom he had actually cohabited for many years,—and by whom he had had so many children; being of opinion that her evidence was not admissible in his favour. It was certainly a

(r) 2 Ves. 18.

doubtful

doubtful question ; and the case alluded to by my brother *Richards* shews that the course pursued by the arbitrator on this occasion has been sanctioned by my Lord *Kenyon*, whose opinions must ever be held in respect and reverence. He, in a criminal case, rejected the testimony of a woman whom the prisoner had called his wife. Certainly there have been many instances where the Courts have refused to interfere on the ground of a mistake by an arbitrator on a point of law. The case of *Ching v. Ching* goes precisely to that point. In that case the arbitrator was a clergyman, and the Lord Chancellor said, " If a question of law be referred to an arbitrator he must decide upon it, and though he decide wrong, you cannot help it." Here certainly it was a question of law, whether the witness was admissible or not. There have been other cases where the arbitrator has prayed the aid of a Court, and stated the grounds of his doubts on the face of the award, and there certainly the Courts have interfered, and given an opinion. In the case of *Ives v. Medcalfe*(s), the marriage articles were shewn to one arbitrator only, and the other swore that if he had seen them he believed he should not have made such award. There his Lordship held that the award was unfairly obtained, and on that ground decreed that it should be set aside ; but he agreed to the general rule, that the arbitrators are judges of the parties own choosing, and that therefore they cannot object against the award as an unreasonable judgment, or as a

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(s) 1 Atk. 63.

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judgment against law. And again, in *Ridout v. Pain*, it was admitted that the arbitrator's award might have stood if it had been on a doubtful point of law. In the present case, the reference was to a person of competent judgment to decide, and therefore, I think, we must confirm the award.

GRAHAM, Baron. I shall observe the same prudent forbearance, as to giving any opinion on the admissibility of the evidence rejected, as has been adopted by my Lord *Chief Baron*, for it does not seem necessary to the present question, which is, whether this award should be set aside. This case is distinguishable from those cited by Mr. *Parke*, for the plaintiff here has done every thing he could, short of proof, to give the public reason to consider this woman as his wife. At all events, Mr. *Evans*, a very fit person to select on such an occasion, was chosen arbitrator by the parties, to determine all questions which should arise; the admissibility of the evidence was a point of law, and that was the principal point which they came to the assizes to try; all depended on that point of law. It is a necessary part of the judge's duty to decide whether a witness be competent, and he must have come to his determination on the result of an examination on the *voir dire*. Here the arbitrator inquires what the witness tendered is to prove, and then decides that she is incompetent. The Court is therefore sound in its judgment, in saying that this cause has been as finally determined as if it had been decided at *Nisi Prius*.

RICHARDS,

RICHARDS, *Baron.* I am entirely of the same opinion. And I shall also abstain from any opinion on the collateral point of the witness's competency. I should certainly have acted in this case as Mr. *Evans* has done. The reference to him was a complete transfer of the jurisdiction of the Court before whom the cause was to have been tried, and by that transfer the plaintiff put himself in the situation of not being nonsuited at the trial. He was not aware, until informed by his counsel at the assizes, that the woman could be examined, and then he agrees to refer it to Mr. *Evans*, who with his usual candor when he has heard what she is to prove, says, that the evidence is not admissible, and that was the point with which they went to him. He has decided, and there was an end of the suit. There is no complaint of any thing else but of the rejection of this witness's testimony alone, and as he was fully authorized by all parties, the Court will not disturb the award.

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Rule discharged.

MENZIES

Saturday,
5th June.

A defendant may move to dissolve an injunction for insufficient service of the subpoena although he has not appeared.

An attorney, having once entered an appearance for a party, not entitled to strike it out, but on an application to the Court for leave.

Service of subpoena by leaving the label at a counting-house of defendant not sufficient, unless given to a partner, or some acknowledged clerk there.

MENZIES v. RODRIGUES, and others.

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DAUNCEY moved, on the part of *Francisco Joze Rodrigues*, one of the defendants, to set aside the attachment and injunction which had been obtained in this cause, to restrain the defendants from proceeding at law, on the ground of inefficient service of the subpoena.

It was at first objected, that this application could not be entertained, the defendant, on whose behalf it was made, not having yet appeared, but the Court ruled, that it was competent to a defendant to make such a motion on such grounds, without having previously entered his appearance.

Dauncey then proceeded to state that the defendant used, as his counting-house, a room in the lower part of the dwelling-house of a person who let the whole of the apartments on his ground floor to different merchants, for the purpose of business, and that the only service of the subpoena in the present instance had been effected by leaving the label at that house, with some person or other whom the clerk happened to find there. It had been so left on Saturday last, but the defendant being out of town did not receive it till the following Tuesday, and he insisted therefore that such a service was bad.

Rouppell,

Rouppell, contra, contended that service of a subpoena at a defendant's place of business, and not at his place of residence, was good service, and had been decided to be so, in a case with which he had been furnished by the officer of the court. He stated, that the attorney for the plaintiffs at law had been applied to, and that he had entered appearances for the other two defendants, and had also appeared for the applicant, but had afterwards struck it out of the book.

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[*Thomson, Chief Baron*. If it is seen by reference to the appearance-book that he has done so, we will not permit him now to withdraw his appearance] (t).

[But on reference, though the name had been entered and was struck out, yet as it was satisfactorily explained to have been the mistake of the officer, and not of the attorney; it was considered tantamount to never having been entered at all.]

The plaintiff's counsel then added, that the person with whom the subpoena had been left was the servant of the proprietor of the house.

Thomson, Chief Baron. That was certainly not a proper person in this case. Where the service of subpoena by leaving it at the counting-house or place of business of a person abroad at

(t) But the entry of an appearance may be withdrawn on motion to the Court for leave.

the

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the time, has been held good, there must have been some partner or acknowledged clerk in attendance there to whom it should be given.

GRAHAM, *Baron*. This is too loose to be considered due service of a process so important. The consequence has been, that instead of getting it on Saturday, as he should have done, the defendant did not receive it till Tuesday.

RICHARDS, *Baron*, of the same opinion; and added, the knowledge of the attorney will not fix a defendant.

Motion allowed.

Saturday,
25th June.

The KING v. LUSHINGTON.

In reckoning the degrees allowed for proceedings in aid, the King's debtor not to be counted.

And the sheriff may return and seize the debts due to the debtor in the third degree.

GASELEE and Carr moved that so much of the inquisition taken on the writ of extent issued in this cause, as related to the finding *Mary Salter Dehany* indebted to the defendants in the sum of 5,395*l. 5s.* and to the taking and seizing the same into his Majesty's hands, might be quashed.

They stated, that *Austen & Co.* having been found by commission indebted to the Crown, an extent had issued against them, and by the inquisition

sition taken on that extent *Boldero & Co.* were found indebted to *Austen & Co.* in 29,000*l.* An extent then issued against *Boldero & Co.* when the *Lushingtons* were found indebted to them, and an extent having consequently issued against *Lushington & Co.* this debt of Miss *Dehany* to them had been found by the Sheriff under the inquisition taken thereon; and they submitted that Miss *Dehany* was not a debtor within the degrees allowed for proceedings in aid of the king's debtor, by the practice of the Court, and the rules made in Hilary term 15 Car. I. According to those, debts may be found to the third degree, but not beyond (u), and therefore this debt from Miss *Dehany*, being in the fourth degree, ought not to have been found.

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Dauncey, contrd. This is moved on the behalf of *Lushington*, who is clearly within the degrees.

• • •
THOMSON, Chief Baron. In computing the degrees the king's debtor is not to be reckoned. This debt therefore is within the degrees, and must come in aid.

GRAHAM, Baron. If you could not touch debts in the third degree, the extent in aid would in many cases be nugatory, and property to a great amount might escape. The sheriff here is directed to make a return of the debts due to the

(u) *Ewin's Case, 30 Cha. II. Parker 259.*

Lushingtons,

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TON.

Lushingtons, and he returns *Dehany* indebted, as he was bound to do.

RICHARDS, Baron, of the same opinion.

Motion refused (x).

(x) Hilary Term, 54 Geo. III.

The KING v. BLACKETT and another, Assignees of LUSHINGTON.

The Court will not, in exercise of its equitable jurisdiction over extents, grant a writ of *amoveas manus*,

[11th February]
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to release property seized under an extent in aid against a debtor in a more remote degree, on the ground that the debt which had been found on the original commission to be due to the King's debtor, has been subse-

A RULE nisi having been granted last Michaelmas term for a writ of *amoveas manus*, to amove his Majesty's hands from the possession of the leases, goods, chattels, debts, monies and effects of the *Lushingtons*, seized under a writ of extent, the debt of the Crown being satisfied; and cause having been shewn;

GIBBS, Chief Baron, this day delivered the judgment of the the Court, as follows:

This was an application on the part of the assignees of Messrs. *Lushington* to have the hands of the Crown taken off from property which had belonged to Messrs. *Lushington*, and which they stated now belongs to their assignees, and which had been seized by the Crown under an extent. • •

The facts of the case were these: Messrs. *Austen* and Co. were debtors to the Crown to the amount of 48,000*l.** *Boldero* and Co. were debtors of *Austen* and Co. and *Lushington* and Co. were debtors of *Boldero* and Co.;—*Boldero* and Co. and *Lushington* and Co. have both become bankrupts. The debt from *Lushington* and Co. was unliquidated in the first instance, and therefore

consequently satisfied, by the payment of bills of exchange deposited with him for securing that debt; if it appear that those bills were not the *bona fide* property of the person depositing them, who thereby committed a breach of trust; because the Court will consider that the real proprietors of the bills have a paramount claim on the person with whom they had been so deposited, if he has been satisfied his debt by other means. And as between the different debtors to the King's debtor, no one of them has an equitable claim to be relieved from any burden which must consequently fall on some one of the others.

Nor is any preference as to moveable or real goods, or debts, to be observed in the levy, all being alike equally the subject of seizure.

* The amount of taxes paid into the house by *Austen*, who was Deputy to the Receiver General for Oxfordshire.

therefore a commission issued, upon which that debt was to be found and ascertained, before an extent could issue on the commission; and by inquisition the debt was fixed at 48,000*l.* Upon the return of that commission, and on the same day, the 2d of January 1812, an extent issued against *Austen* and Co.; an inquisition was taken upon that extent, which inquisition found that *Boldero* and Co. were indebted to *Austen* and Co. in 29,000*l.* Upon that return an extent issued against *Boldero* and Co. and an inquisition was taken upon that extent: and upon the return of that inquisition *Lushington* and Co. were found indebted to *Boldero* and Co. in a very considerable sum. Taking the separate debts, and the joint debts due from *Lushington* and Co. to *Boldero* and Co. they amounted to somewhere about 200,000*l.* The inquisition upon that extent against *Boldero* and Co. which found the debt due from *Lushington* and Co. to them having been returned, an extent issued against *Lushington* and Co. under which, property of *Lushington* and Co. and debts due to them, were found to the amount of about 10,000*l.* There is one debt of *Dekany*, to the amount of 5,000*l.* but the whole amount, I think, is 10,000*l.* Another extent then issued against *Boldero* and Co. under which they seized property of *Boldero* and Co. to the amount of 19,000*l.* so that the case stands thus: Here is an extent against *Austen* and Co. under which a debt from *Boldero* and Co. is found to them:—an extent from *Boldero* and Co. under which a debt from *Lushington* and Co. is found to them. The debt found from *Boldero* and Co. to *Austen* and Co. is 29,000*l.* Under the extent against *Lushington* and Co. property and debts are seized to the amount of 10,000*l.* and under the extent against *Boldero* and Co. other property is seized to the amount of 19,000*l.* which makes up the sum of 29,000*l.* due to *Austen* and Co.

Under these circumstances, *Lushington* and Co. desire that the hands of the Crown may be taken off from the 10,000*l.* seized against them; and they profess that they make their application upon the equitable jurisdiction which the Court has over extents; and they say, the issuing this extent against us was extreme hardship and injustice, for by seizing this 10,000*l.* from us, it is intercepted from the creditors of

Lushington and Co. who, I before stated, have been bankrupts, and the whole is swallowed up by the Crown.

The grounds upon which they state that this debt ought not to be cast upon the estate of *Lushington* and Co. are two: one of them affects the debt from *Boldero* and Co. to *Austen* and Co.; the other arises out of the state of the property of *Boldero* and Co. With respect to the first, they say it is very true, there was at the first issuing of this extent a debt of 29,000*l.* due from *Boldero* and Co. to *Austen* and Co.; but, say they, it is equally true there was at the time deposited by *Boldero* and Co. with *Austen* and Co. bills of exchange overriding the full extent of that debt; and those bills of exchange have since been productive. *Austen* and Co. by turning those bills of exchange into money have been paid their whole debt; and therefore at present there is nothing to support the subsequent extents; for there is no debt due from *Boldero* and Co. to *Austen* and Co., inasmuch as those funds, which were deposited with them, have entirely discharged that debt.

The facts of the case, with respect to the deposit are these:—And it will be remembered here, that this is an application not to regulate the *venditioni exponas*, or to direct what sum shall be raised by the sale, but to take the Crown's hands off the property of *Lushington* and Co. altogether, on the ground that there is no pretence for a debt.—The fact is, that of those bills of exchange and other securities which were deposited by *Boldero* and Co. with *Austen* and Co. there were bills to the amount of 3,000*l.* the property of *Boldero* and Co. themselves. With respect to all the rest the affidavit is silent as to the real property; but there is an affidavit from one of the partners, which states, that notices have been given to *Austen* and Co. that those negotiable securities (a great number of them at least) which were deposited by *Boldero* and Co. with them, were not the *bond fide* property of *Boldero* and Co. but were actually the property of the persons giving those notices, who had deposited them in trust with *Boldero* and Co.; and that it was a breach of trust in *Boldero* and Co. to deposit them, as a security for a debt of their own, with *Austen* and Co. That will not affect the right that *Austen* and Co. have to apply those bills of exchange to their own use,

in satisfaction of a debt due from *Boldero* and Co. to them; because if the original proprietors of those bills which were negotiable securities, chose to intrust them to *Boldero* and Co. they carrying upon the face of them the character of being negotiable securities, and appearing to be the property of *Boldero* and Co. they must abide by the consequences; but always subject to the equity, that if *Boldero* and Co. deposited those bills with *Austen* and Co. or any others, as a security for a debt of their own, if that debt can be satisfied out of any other funds, the original proprietors of those securities, in the management of which *Boldero* and Co. were guilty of this breach of trust, have a right to call upon *Austen* and Co. for an account of the produce of the securities so misapplied by *Boldero* and Co.—*Austen* and Co. are not themselves to suffer by the breach of trust, of which they were not cognizant, by *Boldero* and Co. but, provided they can be prevented from suffering, by a fund being supplied to them for the payment of their debt out of the actual property of *Boldero* and Co. then they shall account for this property to the persons to whom it really belonged; so that it cannot be pretended upon this transaction, so disclosed to the Court, that there is more than 3,000*l.* actually clear, for there is no more which is stated to be the property of *Boldero* and Co. themselves. Upon that ground therefore the Court are of opinion that there is no foundation for the application to take off the hands of the Crown from the extent against *Lushington* and Co.

That ground of application is wholly independent of the second: that rests wholly upon an endeavour to impeach, at present, the existence of a debt between *Austen* and Co. and *Boldero* and Co.; but there is another ground: It is stated, whatever be the situation of the debt between *Austen* and Co. and *Boldero* and Co.; though that may still remain, yet an extent having issued against *Boldero* and Co. while there was any property of *Boldero* and Co. that could satisfy that extent, you have no right to proceed farther, at least in your extent, against *Lushington* and Co. who were only the debtors of *Boldero* and Co.; in other words, as it was correctly stated by Mr. *Gaselee* and Mr. *Ralph Carr*, who argued the case, while the person against whom the extent issues has moveable

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or real property of which you can make the debt, you have no right to proceed against his debtors ; and, as a proof that *Boldero* and Co. had other property of which this debt might have been made, Mr. *Healing* states in his affidavit a letter from Mr. *Lambe*, the solicitor for the assignees of *Boldero* and Co ; from which it appears that after 19,000*l.* had been levied upon the property of *Boldero* and Co. the assignees deposited the sum of 10,000*l.* to induce those who prosecuted the extent to proceed in their extent against *Lushington* and Co. and not to seize any thing further of the moveable property of *Boldero* and Co. ; and this they say, and they truly say, shews decidedly that *Boldero* and Co. had other property, on which the whole debt of 29,000*l.* might have been levied, and upon that they build this legal proposition, that the extent against *Lushington* and Co. ought not to be prosecuted, because from the moveable and real property of *Boldero* and Co. the full sum stated in the extent against *Boldero* and Co. might have been levied. Taking these to be the facts, the Court are of opinion that there is no foundation for that proposition in law, that there is no distinction to be made between the moveable and real property, and the debts of a defendant against whom an extent issues ; all is equally his property as between him and the Crown, or the person who is entitled to use the name of the Crown, in the issuing of that extent ; and the Crown has as much right under an extent against *Boldero* and Co. to seize the debts due to *Boldero* and Co. and to levy them, as it has to seize the chairs and tables, or any other property which may be found in the possession of *Boldero* and Co. There is no ground therefore for saying that those who prosecuted this extent had not a right to seize this debt, and have not now a right to hold this debt of *Lushington* and Co.

But it is said, that the assignees of *Lushington* and Co. have an equity upon this sum ; that they are unjustly subjected to a burthen which ought not to have been cast upon them ; that the estate which would otherwise have been divided among the creditors of *Lushington* and Co. is by these means swept away, and applied to the purposes of the extent, and nothing remains divisible among those creditors. That is perfectly true ; but let us see what must be the consequence if we should make the

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the order that is prayed. It is perfectly true that that order would relieve the assignees, and consequently the creditors of *Lushington* and Co. but where is that burthen then to fall? it must fall upon the assignees and creditors of *Boldero* and Co. for if this be not levied upon the estate of *Lushington* and Co. it must be levied upon the estate of *Boldero* and Co.; and what equity is there between the assignees of *Lushington* and Co. and the assignees of *Boldero* and Co. which should give to the assignees of *Lushington* and Co. a preference, and entitle them to say, we have an equitable claim to have this burthen removed from our shoulders, in order that it may be thrown upon the shoulders of the assignees of *Boldero* and Co.? The Court does not see that there is any foundation whatever for that proposition; they are of opinion that the proceedings have been regular; they are of opinion that no priority has been gained to which the parties were not legally entitled; and that there is therefore no foundation for the application that the hands of the Crown may be taken off from the property seized under the extent against *Lushington* and Co.

Rule discharged.

REED v. BOWYER.

Tuesday,
28th June.

A BILL had been filed against the Vicar of *Effingham*, in the county of *Northumberland*, to establish a modus for hay, and for an injunction to restrain him from proceeding in the ecclesiastical court for tithes of agistment, turnips and potatoes.

The Court will discharge an order for an injunction obtained on a motion of course, if it ought to have been moved for on notice.

The plaintiff here had pleaded the modus in the ecclesiastical court, but the bill having laid the modus as covering hay only, the Court refused the application on his own shewing. The bill was afterwards amended, when the modus was laid as

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covering hay and other tithes, and the plaintiff obtained an order for an injunction as a motion of course.

Dauncey and *Simpkinson* now moved to discharge that order, with costs, for irregularity, on the ground that it had not been a motion of course in the first instance ; and that if it were, it was not so after having then failed, and therefore notice of motion should have been given to the plaintiff (*x*). *Macnamara v. Macquire* (*y*). *Abthorpe v. Jennings* (*z*).

Martin, contrô, submitted that the motion had received the sanction of this Court, which is not bound by the practice of the Court of Chancery.

The question being put to the Register,

The Court were of opinion that an injunction to stay proceedings at law did not extend to suits in the ecclesiastical court ; and that a special motion was necessary for that purpose. It was an injunction which required a different form, and they

Discharged the Order, with Costs.

(*x*) 1 P. Wms. 301. anon. (*y*) 1 Dickens 323. (*z*) Bunb. 27.

MORLEY

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MORLEY v. COLE.

Tuesday,
28th June.

SCARLETT now showed cause against a rule which had on a former day been obtained by *Hughes*, for setting aside an order granted on the 16th *February* for the allowance of bail in this cause, on the authority of *Jones v. Eamer* (a) and *How v. Lacy* (b), where, under the same circumstances, the Court of Common Pleas refused to set aside an allowance of bail.

Vid. note (c)
next page.

That rule had been granted on the affidavit of the clerk of the plaintiff's clerk in court, which stated, that bail above not having been put in and justified in due time, nor any bond given to the sheriff, the plaintiff had commenced an action against the sheriff for an escape on the 12th of *February* ;—that on the 16th of *February* the defendant obtained the rule for allowance of bail ; and that the bail allowed were, as deponent believed, wholly insufficient.

From the affidavit on which it was now opposed, it appeared that the writ of *quo minus*, on which the defendant had been arrested, was returnable in eight days of St. Hilary, and that on the 24th of *January* the sheriff of London was ruled to return

(a) *Anstr. 675*, where the Court held, that the Sheriff who has let the defendant go at large without taking a bail-bond, was liable to an action for an escape, although he put in bail when ruled to return the writ.

(b) *1 Taunton 119*; & *Fuller v. Prest*, 5 T. R.; *Webb v. Matthew*, 1 B. & P. 225.

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the writ. On the 28th, the plaintiff obtained a rule to bring in the body, although the rule to return the writ had not then expired; and in the evening of the same day bail was put in, and the bail-piece handed over in the usual manner; that on the 4th of *February*, previous to the sitting of the Court, the defendant was surrendered before Mr. *Baron Wood*, into the custody of the Warden of the Fleet, in discharge of his bail, and notice was tendered to the Plaintiff's Clerk in Court, who refused to receive it, and afterwards, on the same day, moved for and obtained a rule for an attachment against the sheriff for not bringing in the body, which was afterwards set aside on motion for irregularity, with costs (c). That on the 10th of *February* the plaintiff was served

(c). That rule was moved to be discharged on these grounds: 1st. That the sheriff having been ruled on the 24th of *January* to return the writ, and on the 28th to bring in the body, the latter rule was premature, the former not having completely expired on the 28th.—2dly. If that were not so, the defendant having been actually surrendered on the 4th of *February*, before the issuing of the attachment against the sheriff, they were exonerated by such render.

In support of the rule, it was insisted, 1st, that by the practice of this Court, a defendant is allowed only four days inclusive after the return-day of the writ, to put in bail, if the writ be returnable on the first return, (though on any other return-day the four days are reckoned exclusively,) and the plaintiff is entitled to rule the sheriff to bring in the body as soon as the writ is returned, although that rule may not have expired, provided the time for putting in bail is out*; and as the defendant had not put in bail above on the 27th, the plaintiff had not been premature in ruling the sheriff on the 28th to bring in the body; and 2ndly, that, the surrender on the 4th of *February* did not discharge the sheriff, as he had not

* *Gore v. Williams*, Anstr. 653.

served with notice that the defendant would put in and justify bail on the following *Saturday*, (the 12th); that the bail did attend; and that their allowance was opposed, on the ground of defective notice, it not having been served till after nine o'clock in the evening. On the same day notice was given that the same bail would justify on the following *Monday*, (the 14th) at the house of Mr. *Baron Wood*, when the bail were permitted to justify, the plaintiff not opposing them; but his clerk in court gave notice to the deputy warden of the Fleet not to discharge the defendant, as the order had been surreptitiously obtained. Another notice was then served on the plaintiff's clerk in court, that the same bail would justify before whatever Baron should sit at the Sessions House in the Old Bailey, on the following *Wednesday*, (the 6th) where they did attend, and were opposed; when being permitted to justify, on payment of the costs of the former opposition, the usual rule for the allowance was drawn up, and the defendant discharged out of custody.

Scarlett,

not taken any bail-bond, and could not purge his contempt by a subsequent surrender after expiration of the rule*.

The Court, without giving any opinion on the first objection, beyond expressing disapprobation of the practice which had been said to prevail in this Court, of the time for putting in bail expiring before the rule to return the writ, (by which notwithstanding, they held that they must be bound for the present, whatever they might do thereafter, as to altering that practice) discharged the rule for the attachment, with costs, on the second objection; deciding that the surrender on the 4th of *February*, before obtaining the attachment, had exonerated the sheriff.

* *Rex v. Sheriff of Middlesex*, 8 T. R. 29.—and 1 *Taunt.* 119.

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Scarlett insisted, that the plaintiff should not have lain by in contemplation of obtaining an attachment against the Sheriff, as he had attempted to do, by taking advantage of the practice peculiar to this Court, of a defendant being allowed only three days to justify, while the sheriff had four days to return the writ. The defendant however, had been surrendered by the sheriff before the attachment had been obtained, and it was subsequently set aside on that ground. The Court then thought that the plaintiff had kept aloof for the purpose of fixing the sheriff, and would not allow him to do so. Now he is attempting to effect the same object by other means; but the Court will not assist him in this suit against the sheriff for the escape, by setting aside this allowance of bail, after having been regularly excepted to and opposed. He has besides put the costs of the opposition in his pocket, having made the payment of them a condition of the bail justifying. Such conduct amounted to a waiver of his right of proceeding against the sheriff. The defendant having been surrendered, and in custody eight days before the action against the sheriff had been commenced; is sufficient to distinguish this case from those cited, the plaintiff thus having here the security of the body.

Hughes, contrd. insisted, that the affidavit which had been put in on the part of the defendant did not apply to the merits of the present motion, which was made on distinct grounds, to set aside

The rule to bring in the body had not been obeyed ; and on searching for the bail-bond none had been taken, and therefore the present case was precisely within the circumstances of *Fuller & Prest.* (*d*), and the other cases cited, which it had been denied to resemble. Nor is the plaintiff's having excepted to the bail any waiver of his right to proceed against the sheriff. So it was held in *Williams v. Waterfield* (*e*), where leave was given to the plaintiff to oppose the justification of bail, without prejudice to his right of attaching the sheriff. It is said that we had the security of the body ; we might have had such security at one time perhaps, but if we had, we lose it by the allowance of bad bail.

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[The officer of the Court being referred to on the point of practice, and having reported that the proceeding of the sheriff in surrendering the principal had been correct ;]

They discharged the Rule with Costs.

(*d*) 7 T. R. 109.

(*e*) 1 Bos. & Pul. 334.

HARRISON

*Tuesday,
28th June.*

Signature of
counsel to
answer not
appearing on
the record
the defendant
must apply
for leave to
amend.

HARRISON v. DELMONT.

IT was moved by *Horne & Hindes* that the defendant's answer which had been filed in this cause should be taken off the file, on the ground of irregularity; the signature of counsel to the answer not appearing on the record.

Cooper stated to the Court, that the irregularity on which the motion was founded proceeded entirely from a clerical error in the engrossment,—that the answer had been drawn by him; and that he had signed the draft according to the usual course, nothing more being in any case required to be done by counsel.

The Court were of opinion, that as the counsel who drew the answer had avowed the draft, it would be too much to order that the answer should be taken off the file, but that it was certainly necessary that the defendant should apply for leave to amend, on paying the costs of the present application.

And they intimated, that if it had not been shewn that the draft of the answer had been signed by counsel, the motion would have been granted.

WILCOCKS

WILCOCKS v. NICHOLLS.

Wednesday,
29th June.

DEBT on bond to perform an award.—Plea performance.—Replication setting forth the award, and assigning the following breaches in the words of the award : 1st. That defendant did not at the time and place in the said award mentioned, state and render unto the plaintiff an account of debts due to the partnership, but so to do, &c. 2dly, That the defendant did not, out of the monies by him collected, pay all just debts due from the said partnership, or any part of such debts, according, &c. 3dly, That the defendant did not, when the balance in hand of monies by him collected amounted to 20*l.* or within fourteen days after, &c. pay one moiety of the said balance to the said plaintiff, or to the Naval and Commercial Bank at Plymouth Dock, in the plaintiff's name. 4thly, That defendant did not use his best endeavours, and with as little delay as possible, to receive, get in, and collect the same.

Assignment of breaches in debt on bond to perform an award in the words of the award, generally held sufficient, although the plaintiff do not shew that performance might have been effected, or that the defendant had become enabled to carry it into effect by the circumstances having taken place on which it was to have been performed, the award being held to assume that they had.

And the fact of such circumstances not having taken place, if they lay properly within the defendant's knowledge, should be pleaded and set out by him.

Demurrer to 1st breach : For that there doth not appear that at the time, &c. or at any time after, that there were any outstanding debts due, &c. ; to the 2d, That it doth not appear that there were or was at the time, &c. or at any time after the making, &c. any debt or debts due from the said late partnership, nor that at or after, &c. there were any monies collected by the defendant, as in the said award mentioned, out of which it was awarded that

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that, &c. ; and also, that it does not appear what debts in particular, or to whom due, if any were due, from the said partnership, the said defendant did not pay ; and also that the said breach is too general, vague, indefinite, and informal, and that it doth not appear what monies were by him collected, or from whom, or to what amount.—To the third breach, that it does not appear that the balance in hand collected by the defendant did at any time amount to 20*l.* or that there ever was any balance in hand, or that any balance in hand by him collected amounted to 20*l.* within fourteen days next before the commencement of this suit, or at any prior time ;—and to the fourth breach, that it does not appear that there was or were any debt or debts due to the said partnership, at or any time after the making of the said award, nor from whom due, &c. ; and that it doth not appear that there was any particular delay, or what delay, on the part of the said defendant in collecting any particular debt or debts, or what was the amount, or from whom the same were due, &c.—Joinder in demurrer.

Saturday
18th June.

Baillie, in support of the demurrer, objected to this order (*c*) of assigning the breaches, and the general way in which they had been assigned, whereby the defendant was deprived of a more effectual rejoinder, and contended, that on the first breach the plaintiff should have averred that

(*c*) The first breach assigned is the last in order of the performances required by the award.

there

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there were debts due, that the defendant might have had an opportunity of denying their existence, or of rejoining satisfaction, and have taken issue thereon, which could not be pleaded to a replication averring merely that no account of outstanding debts had been delivered ; and insisted, that so general a mode of assigning breaches was not allowable in pleading. In *Farrow v. Chevalier* (*f*), which was covenant by a master against his servant, it was held by *Holt, Chief Justice*, that in debt on bond to perform covenants, the replication must shew a certain breach, although in covenant it is enough to assign a general breach (*g*). In *Hayman v. Gerard* (*h*), the plaintiff replied to the defendant's plea of no goods having come to his hands, that a silver bowl had come to his hands; and that replication was held bad, though it went farther than this. The assignment of breaches must be certain and particular ; *Stone v. Bliss* (*i*). *Haulsey v. Carpenter* (*k*). *Parker v. Middleton* (*l*). *Wilkinson's case* (*m*). *Stapleton v. Trewlock* (*n*). But by modern decisions the strictness of the rule of assigning breaches has been somewhat relaxed ; yet a certain degree of particularity is still essentially necessary. The first of those recent cases is *Cornwallis v. Savery* (*o*) ; there the plaintiff replied, sums of money received and not paid over according to the condition of the bond ; and had the plaintiff in this case done so here, we might have

(*f*) *Salk.* 139.(*k*) 2 *Bulstr.* 266.(*g*) *Com. Dig.* tit. *Pleader*,(*l*) 1 *Lutw.* 419.

F. 14.

(*m*) *Latch.* 16.(*h*) 1 *Saunders* 102.(*n*) *Moore*, 11.(*i*) 1 *Bulstr.* 43.(*o*) 2 *Burr.* 772.

rejoined

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rejoined an account delivered, or no outstanding debts, and have taken issue on one or the other, and should not be driven, as we now are, to one only. Such a general mode of pleading would lead to great prolixity ; for if a plaintiff replies generally, a defendant must rejoin generally. In *Shum v. Farrington* (*p*), the plaintiff went far beyond this replication. There also it was averred, that divers sums of money had been received which were not accounted for, which was held not too general, because from the nature of the fact it could not be otherwise assigned. In the case of *Barton v. Webb* (*q*), the condition of the bond was, that the obligee should account for and pay to the plaintiff (the treasurer) all money which should come to his hands as collector, for the use and benefit of the charity-school. To plea of general performance, the replication that he had received divers sums of money contributed for the use of the charity-school, which he had not accounted for or paid, was held sufficient. So in this case the plaintiff ought to have averred, that there were outstanding debts, and that the defendant had not given an account : nor is there in either of the other breaches assigned any averment necessary to shew that the plaintiff had acquired a right to sue on the bond. It is not sufficient to adopt literally the words of the award, without going so much further as to shew that the award might have been performed, and that the circumstances, on which the performance was required, had arisen. A previous possi-

(*p*) 1 Bos. & Pull. 640.(*q*) 8 Term Rep. 459.

bility

bility on the part of the defendant should be shown, as for instance, in the assigning for breach, that out of the monies collected, and in hand, he had not paid the partnership debts, it should be first stated that money had been collected, and that a balance was in hand, otherwise no action could be brought for not applying it according to the award.

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[*Wood, Baron.* The assignment of the breach necessarily implies that money had been collected.]

But a creditor is not compellable to take less than his whole debt, and the money collected (if any had been paid,) might not be sufficient to satisfy the full demand of any of the creditors, and in that case the award could not be performed.

Gifford, in support of the replication.—This is a demurrer to the replication: had it been earlier in the proceedings it would have been competent to the plaintiff to object to the defendant's plea. Having craved *oyer* of the award, he should have pleaded, and set out a specific performance. These breaches are assigned in the words of the award, and in *Comyns's Digest, Tit. Pleader, C. 45*, it is said that it is sufficient that the breach be assigned in the words of the covenant, promise, &c.; as if a covenant, promise, or condition of an obligation be to show a sufficient record, it is sufficient to say that he did not show a sufficient record, though issue cannot be joined upon it; for the sufficiency of a record does not lie in the mouth of *lay gens*, but a defendant on such breach assigned, may say,

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that

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that he showed such a record, and recite it, and on demurrer the Court shall judge whether it is sufficient (q).

Another proposition is, that where facts are in possession of a defendant, it is incumbent on him to plead them. The plaintiff could not know whether there were any debts outstanding, or what the defendant had collected, or had in hand; and it is for him to show those facts to the Court, as he alone can be possessed of the knowledge of them. The majority of the cases which have been cited for the defendant are cases to that effect. But it is forgotten that the award assumes these debts to have been collected: and the arbitrator accordingly directs, that out of the monies collected by the defendant, he should pay all just debts due from the partnership. The fact is, that the defendant has not in any part performed the award; he has not paid over any of the debts collected, nor has he delivered an account. He might have pleaded a specific performance, but he has pleaded performance generally.

[*Chief Baron.* The objection on this demurrer is, that the plaintiff should have given the account, and not the defendant.]

Our averment is, that he did not pay the whole or any part thereof, and as one of your Lordships has observed, it is to be collected from the breach

(q) R. Yel. 39, 40.

assigned

assigned, that money had been received which has not been paid according to the award. By the demurrer the defendant admits that he has received money, and has not paid it, if this replication be good. The breach of using his endeavour could not be otherwise assigned. In *Shun v. Farington*, and *Burton v. Webb*, it was incumbent on the plaintiff to aver that the defendant had received money, and had not accounted, and the breaches there were assigned in a general way. This case falls within the rule of pleading, that breaches may be assigned in the general words of a covenant.

1814
WIECOCKS
v.
NICHOLLS.

Baillie, in reply. No cases have been brought forward to shew that the defendant is called on to plead facts which lie within his knowledge generally; and in this case the parties were partners, and their knowledge must have been equal. But the objection is, that there is no direct averment which the defendant could meet by any precise contradictory statement.

The Court this day expressed themselves to be clearly of opinion, that the present case came within those referred to in *Comyns' Digest*, where it was held sufficient to assign breaches in the words of the condition; and that though the present was not exactly similar to the cases put there, it was tantamount to them in point of principle. They also gave an opinion on the other point, in favour of the plaintiff, that it was not incumbent on him to state such facts in the assignment of breaches, as lay within the knowledge

June 29.

1814.

WILCOCKS

v.

NICHOLLS.

ledge of the defendant, and might be set forth by him ; and therefore they gave

Judgment for the plaintiff.

Wednesday
29th June.

BATT v. VAISEY.

An affidavit to ground a motion for a rule *nisi* cannot be sworn before the attorney for the party, or his partner.

And a rule obtained on such an affidavit will be discharged with costs.

Dauncey was to have shewn cause against a rule *Nisi* obtained by *Gaselee* for staying all proceedings which had been had in this cause, until the plaintiff should give security to be approved by the master for the payment of costs, he having become insolvent since the commencement of the action, and executed an assignment of his effects to trustees for the benefit of his creditors ; but taking an objection that the affidavit on which the motion had been made, and the rule granted, had been sworn before the defendant's attorney.

The Court held that a sufficient reason for setting aside the rule, although the affidavit was stated to have been sworn before a partner of the attorney in the cause.

Dauncey then applied for costs ; but the Court doubted whether they should give costs in a case where the rule *nisi* had not been discharged on the merits. He then offered to shew sufficient cause for discharging the rule, for the purpose of obtaining costs, but they intimated that that would amount to a waiver

a waiver of the objection of irregularity. On further consideration, they

1814.

Discharged the rule with costs.

HARRISON v. DELMONT.

*Tuesday,
28th June.*

A BILL had been filed for an Injunction to restrain the defendant from proceeding further at law. In the interval between the filing of the plaintiff's bill and granting the injunction, the defendant had obtained a verdict in the court of law.

Plaintiff can not move to amend his bill on an affidavit of equitable facts, without previous notice to defendant.

Horne and Hindes now moved for leave to amend their bill without prejudice to the injunction which had been obtained.

But if the circumstances of the case require it, and it is late in the term, they will order the defendant to accept short notice of motion.

The application was made on the affidavit of the plaintiff, the substance of which was, that subsequently to the filing of his bill, and to the verdict obtained at law, a document had come to his hands which would materially assist the equity of his case.

Cooper contended that the present motion being founded on an affidavit of facts, could not be regularly made without previous notice to the defendant, that he might be thereby afforded an opportunity of answering them by an affidavit on his part.

1814.

HARRISON

v.

DELMONT.

The Court admitted the force of the objection ; but taking into consideration the peculiar circumstances of the case, on the representation of the plaintiff's council, and the advanced period of the term, they required the defendant to accept short notice of motion for the next day.

Wednesday,
June 29.

HARRISON v. DELMONT.

Plaintiff cannot amend his bill, to enjoin further proceedings at law, after verdict, without first paying into court the sum recovered at law, although the original bill was filed before verdict obtained.

But permitted to amend by a stated time, on bringing the money then into court.

HORNE and *Hindes* this day again moved for leave to amend their bill on the affidavit which they had tendered yesterday.

Fonblanque, Darncey and Cooper, having ineffectually opposed the merits of the affidavit, took an objection to the allowance of the motion ; that as this was an application to amend after verdict, the plaintiff was in the same situation as if the original bill had been filed after verdict ; and as in that case the defendant would be entitled, according to the practice of the court, to insist on the sum recovered at law being first paid into the office of the deputy remembrancer, the plaintiff must do so before he could entitle himself to the object of his motion.

The Court determined that the plaintiff could not be permitted to amend his bill without paying the sum recovered into Court, but granted the motion on the terms of plaintiff amending his bill, and bringing

bringing in the money by the third day of the ensuing sittings (a).

1814.

(a) The Court, being resorted to on the point of practice, (it having been suggested, that if the plaintiff were still bound by the order *nisi*, to dissolve the injunction which had been obtained on the coming in of the answer, he would now be deprived of the opportunity of shewing exceptions as cause,) decided that it was necessary for the defendant to move again for an order *nisi*, on putting in his amended answer.

21 B. 46, 470
COLDWELL v. GREGORY.

Wednesday,
June 29.

THIS was an action of trover brought by the assignee of a bankrupt against the defendant, to recover the value of 31,500 bricks, taken away by him after the act of bankruptcy, and 39,400 taken away after the commission issued, of which the bankrupt was reputed owner at the time of his bankruptcy. On the trial at *Nisi Prius*, before Mr. Justice *Le Blanc*, at the last Spring Assizes for York, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case :

Benjamin Hatfield, the bankrupt, carried on at Sheffield the trade of a carpenter as his principal trade, and also the trade of a brick-maker, and in the former trade became indebted to the petitioning creditor. On the 12th of November 1813, he committed an act of bankruptcy, and on the 4th of December a commission issued against him, on which he was duly declared a bankrupt, and the

The share of a secret partner in the joint stock in trade, being in the possession of an apparent partner, and the sole ostensible trader, is not liable to the bankruptcy of the latter, as being within the meaning, or mischief of the 21st of James I. c. 19: the bankrupt having such an interest and qualified property in the secret partner's share, as to destroy the essential requisites of a true and independent

ownership on the one hand, and of a fraudulent and reputed ownership on the other.

1814.

COLDWELL

v.

GREGORY.

plaintiff duly became his assignee on the 22d of December. In April 1813, the bankrupt then carrying on the trade of a brick-maker, on certain land which he then rented for a year, from the 28th of November preceding, with liberty to apply the clay thereof to the making of bricks, at so much per thousand, applied to the defendant to advance money to him to carry on his said trade of brick-making, which the defendant did accordingly, and in May 1813, it was privately and verbally agreed between the bankrupt and the defendant, that they should become partners in the brick-making business for that season, and that the bricks should be made on their joint account. By the consent of the defendant the brick-making business continued to be carried on as before by the bankrupt, in his own name, but on the bankrupt's and defendant's joint account and risk. The name of the defendant at his request was not used therein, and the bankrupt appeared to the world to be the sole owner; but part of the capital was advanced by the defendant, and the partnership accounts were carried on, and were settled between the bankrupt and the defendant, as hereinafter mentioned, and all the bricks hereinafter mentioned as between themselves, belonged to their joint account. On the 8th of November 1813, the partnership accounts were balanced and settled by bankrupt and defendant, and it was agreed between them that the said partnership should be dissolved, and that the defendant should have for his share 74,000 of the bricks, then on the brick-making premises, and that the bankrupt should have the remainder for his share,

and

and should pay the partnership debts. The bricks were not proved to have been set apart in pursuance of this agreement, but remained on the premises until they were removed as hereinafter mentioned; and such as were on the said premises on the 9th of December, were that day seized under the commission, by the messenger, as the bankrupt's property. Between the 23d of November and the 9th of December, the defendant carried away from the said premises 31,500 bricks, and on the 3rd of January 1814, he carried away from the same place 35,350 bricks; these bricks had been made by the bankrupt, and as between him and the defendant were the property of the partnership, but had remained apparently in the exclusive possession, order, and disposition of the bankrupt, under the circumstances before mentioned, and he was the reputed owner thereof.

1814.

COLDWELL
v.
GREGORY.

Richardson, in support of the verdict, relied on the present case being within the statute of the 21st of James I. c. 19. §. 10, 11. It is thereby enacted, that "if any person or persons shall become " bankrupt, and at such time as they shall so become " bankrupt shall by the consent and permission of " the true owner and proprietary, have in their pos- " session, order and disposition, any goods or chattels " whereof they shall be reputed owners, and take " upon them the sale, alteration, or disposition, as " owners," the Commissioners shall have power to sell the same for the benefit of the creditors, as fully as any other part of the bankrupt's estate. The Preamble adverts to the mischief intended to be guarded

1814.

COLDWELL

v.

GREGORY.

guarded against by the statute, which is the possession and apparent ownership being in one person, while the actual property is really in another.

There is only one case of the application of this statute to a partner, and the main point of distinction in this case from all the others is, that there is here a partnership, and also an apparent entire possession. Certainly the consent of the partner is the consent of the proprietor, and by permission of his partner the bankrupt in this case acts on both moieties as if he were exclusive owner of the whole; and he had no right so to deal with this property to the delusion of his creditors as a carpenter; but by having done so, he has brought the partner's share within the words and meaning of the statute. In *Binford v. Dommett* (*t*), the plaintiff, a dormant partner, had become an extensive creditor of the joint concern, and had filed his bill against the bankrupts and the assignees under the commission, for an account of the joint property, and the debts, on the footing of the partnership. The point was, whether the partnership should not be tried at law, but the Master of the Rolls doubted whether, under the statute of James, this sort of partnership could be set up.

[*Chief Baron.* The result on that case was a direction of issues.]

But here the facts have been tried, and the existence of the partnership found; and the case

(*t*) 4 Ves. 756.

comes

comes clearly and completely within the mischief which the statute was passed to prevent, the bankrupt acquiring from possession of the partnership property, a delusive credit in aid of his other principal business of a carpenter.

1814.
COLDWELL
v.
GARBOZY.

In *Ryall v. Rolle* (*u*), which has been confirmed by numerous other cases on the point from that time down to the present day, the doctrine of the liability of mortgaged goods, in the possession and apparent ownership of the bankrupt, to seizure under the commission is fully settled. In that case the bankrupt, who was a brewer, having become partner with *Stephens* to whom *Rolle* was an executor, mortgaged to *Potter* in trust for *Stephens*, in consideration of money lent on his moiety of the brewing utensils and stock in trade. There were also other mortgagees, but it was decided that the assignees were entitled in exclusion of the mortgagees, as the bankrupt had still retained the possession, which brought that case within the mischief, and consequently subject to the policy of the statute. So here the partner permitted the bankrupt to practise an imposition on the rest of the world. It is immaterial whether these goods were originally the property of the bankrupt, or whether he were at any time the *bond fide* proprietor of them or not. In *Lingham v. Biggs* (*x*), it was held that a person being allowed to possess goods, so as to become the reputed owner, and appear to have the order and disposition of them, must be

(*u*) 1 Atkyns 165.

(*x*) 1 Bos. & Pul. 82.

understood

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COLDWELL
v.
GREGORY.

understood to have taken upon himself the sole order and disposition of them within the meaning of the statute. In *Rabone v. Williams* (z), the principle is clearly established, that one who is really interested, and stands aloof while another acts as owner of his goods, and sells them, is bound by such sort of acquiescence; and that a purchaser in such case has a right to consider the vendor as the principal; and though the real principal has there a right of action against the purchaser, yet he may set off any demand which he might have against the factor in answer to such an action. The same point was also ruled in *Stracey, Ross, and others, v. Deey* (a), which was a case precisely similar to this, except that it did not turn on the statute of *James*. The principle to be deduced from that case is, that the creditors of the ostensible trader are entitled to the share of a sleeping partner in the stock as if there were none; and that he cannot, after having kept back, come forward to affect the interest of the apparent partner, so as to claim debts supposed to be due to him alone; and thereby elude a defendant's equitable advantages who has dealt with him as if he were solely interested.

[*Chief Baron.* On judgment and execution against an apparent partner would the creditor be entitled to sell the joint property?]

I apprehend he would. The cases seem to go

(z) *7 Term Rep.* 960, *in notis.* (a) *Ibid.*

to

to that extent, for if a dormant partner cannot protect himself in one case he cannot in another, it would be a fraudulent possession within the meaning of the statute.

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COLDWELL
u.
GREGORY.

Scarlett, contrd. The infrequency of this question affords the argument that the doctrine now attempted to be established cannot be supported. The facts of this case are of daily occurrence, and it is very extraordinary that the question should never have arisen, and that the point should not have been agitated before, so as to have furnished an authority on the subject. Mr. Justice *Le Blanc*, when this point was reserved at the trial, intimated, that he had himself no doubt on the law. The accuracy of the report of the case which has been cited from the 4th of *Vesey*, jun. is most doubtful, and it seems impossible that it should be correct, for had Lord *Alvanley* been of opinion, as he is reported to have expressed himself, he must, consistently with that opinion, have considered it unnecessary and nugatory to have directed an issue; for if the partnership had been within the statute it would have been useless to have ascertained the fact by a verdict. But the present case cannot in any point of view be considered within the statute of *James*. The words of the act are, if any person or persons at the time of their becoming bankrupt shall by *consent and permission of the true owner*, have in their possession, order and disposition, any goods or chattels whereof they shall be *reputed owners*. Now in this case, the bankrupt was as fully owner as the defendant, so that it is directly contrary to the

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COLDWELL
v.
GREGORY.

the words of the statute, which provides against a false pretended ownership, and supposes a case of fraud. But then it becomes convenient to argue on the equity and the policy of the statute, and the mischief of delusive and unreal credit, the effect of which it was meant to prevent; but there is no false credit resulting from this kind of possession. On the contrary, the bankrupt in this case, must have had less credit as a person carrying on trade solely, than when it was known he had a responsible partner; for the moment a sleeping partner is discovered his property becomes liable. The fact here is, that the bankrupt took half these bricks, and was to pay the partnership debts. If the argument on the other side were correct, and this action should succeed, the consequences would be that the defendant would be placed in this unfortunate situation, of seeing all the joint effects swept away to pay the bankrupt's separate debts. Such an arrangement would have been most convenient for the creditors of the house of *Burton & Forbes*, and all the cases of marshalling assets. Such difficulties might be easily settled if the whole of partnership property were to go for the purpose of paying separate debts.

There are two classes of cases contemplated by the statute; one, where the bankrupt assigns property originally his own, but retains the possession, and the credit given by it.—Here the state of the credit was the same as at first. The other, where he acquires the possession of another's property, the ownership still remaining in the original proprietor,

priotor; as in the case of a partner going out and leaving his share of the effects and utensils, and taking a mortgage. Now this case comes within neither class; and none of the cases which have been cited bear the least analogy with the present.

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COLDWELL
v.
GREGORY.

It often happens that an experienced trader without capital, is, in consideration of his skill, invested with a share in extensive stock in trade, the property of many; and if the arguments used in support of this verdict were well-founded, such a man might by his own improvident debts involve every individual who was concerned with him in total ruin.

Richardson, in reply. Instead of this being a case of daily occurrence, it certainly more frequently happens that a creditor has an interest in resisting the claims of a sleeping partner. As to the inaccuracy charged on the report in *Vesey*, of the case of *Binford v. Donmett*, in consequence of issues having been directed, which, it is said, would have been nugatory, if Lord *Alvanley* had really expressed the opinion attributed to him, the direction of the issue is thus accounted for: the fact in that case was controverted, and his Lordship did not choose to decide on a point of law not applicable to what then appeared to be the real fact of the case before him. It is said the bankrupt was not merely the apparent but actually the real owner, but it must be considered that it is on the other partner's moiety that the present question arises; otherwise this statute would not apply

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v.
GREGORY.

apply to the case of joint tenants and tenants in common, who are seised *per meie et per tout*; and that question is considered in *Comyns' Digest*, Tit. *Bankrupt*, D. 11.; where it is said, that the commissioners may sell a moiety of the bankrupt's joint estate in fee. Nothing can be more fallacious than to say that he has less credit because his partner is not known. The bankrupt was a carpenter, and he has by means of his partner apparently stock in trade as a brick-maker, which materially augments his credit, and on his becoming bankrupt his creditors have a right to be paid *pari passu* out of the common fund. Suppose a man carry on business as an apparently sole trader, and goods are sold to him and another jointly, which are carried to and deposited in his own separate warehouse, they would certainly pass under the assignment, although the bankrupt would be possessed *per meie et per tout* as joint tenant with the other person, but he would be also possessed of a moiety really and absolutely. Every partner is a joint tenant of a particular description.

Cur. adv. Vult.

THOMSON, *Chief Baron*, now delivered the opinion of the Court. He announced the result of their consideration to be, that the decision in the report of *Stracy v. Deey*, did not touch the present inquiry, and then proceeded to state the leading circumstances of this case. The ground of the action was, that the defendant having allowed the bankrupt to keep possession of his share in the stock of the brick-making business, by which he had

had acquired a false and delusive credit, as to those persons to whom he had become indebted in his trade of a carpenter, had fallen within the statute of the 21st of *James the First*. That statute has certainly provided, by the clause which has been applied to this case, not only against fraud, but against fair transactions, that is, against fair transactions which might be productive of mischief to third persons, as where property has been *bond fide* assigned by the bankrupt, on good consideration, but he is still suffered to keep possession, and consequently has the credit of the apparent ownership. The short case here is, that the bankrupt and the defendant were actually partners in the goods in question. The bricks were therefore the joint property of both, as tenants in common, and the possession of the defendant was the possession of the bankrupt. It is a very different case where there is no partnership between the bankrupt and the person claiming to be interested; otherwise there would be an end of what are called sleeping partnerships altogether, which are now carried on to so great an extent in this country. If under this statute wherever joint property is taken by the assignee of a bankrupt under a separate commission, you deprive a solvent partner of his property, with what is he to pay the partnership debts, which he is still liable to be called on for, notwithstanding his effects have been seized under the commission? And if the assignees are to be considered as having a right to the whole, that evil must be the consequence. It would be a monstrous thing to say, that if an individual in a firm become bankrupt, the other solvent partners may be stripped

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COLDWELL
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v.
GREGORY.

of their property, and thus be deprived of the means of satisfying the partnership debts, by the bankruptey of the one having swept away the joint property of the whole. I am not aware of any case which goes so far as to sustain such a proposition; our opinion therefore is, that there is no ground for the action which has been brought.

Postea to the Defendants.

*Wednesday,
29th June.*

In an information for duties against the proprietors of a glass manufactory the Court will not grant a view of the premises where the question may be tried by the production of a model.

ATTORNEY GENERAL v. GREEN.

BOLLAND moved that a view of the leas of the defendant's glass-house might be taken before the trial of this information. He urged that it was a necessary step to the attainment of complete justice in the present case; and produced as a precedent, an order of the Court of 2d May 1770, made in the case of *The Attorney General v. Gordon*, where the Court had granted a similar application for a view on the part of the defendant, in an information for intrusion.

[*Chief Baron.* That precedent is in a suit for land.]

Dauncey opposed the motion, on the objection of great inconvenience to the Board of Excise if views were to be granted in all cases of this description; and stated that the usual mode of trying such questions had been by means of a model of any complicated part of the manufactory, that it might be found necessary to explain, to assist the comprehension of the jury, which had always been allowed

allowed to be put in as evidence, on proof of its correctness; and he quoted a case of *The Attorney General v. Mathew (a)*, which was an information for preparing and sending out to common brewers, stale beer, beer-grounds, and sugar-water; where, though a rule *nisi* for a view of the premises had been granted in the first instance, it was subsequently discharged on cause shewn, and the information was afterwards tried by a model produced.

1814.
ATTORNEY
GENERAL
v.
GREEN.

THOMSON, *Chief Baron*. We should be very sparing of introducing new rules in these cases, where the former practice has been found sufficient to answer its purposes. During the short time I have sat here, I have certainly found that the mode of trying these questions by means of model, where it has been necessary, fully satisfactory. In the case of land the statute of the 4th and 5th of *Anne*, c. 16, §. 8, gives a right to claim a view. It is often necessary in actions of trespass *quare clausum fregit*. And informations of intrusion are so nearly allied in their nature to such actions, that the Court has granted views there, on the principle of analogy. So also in actions of waste; but there is no satisfactory reason shewn for it here, where a model may answer every purpose.

Motion refused.

(a) Hil. Term 51 Geo. III.

THE END OF TRINITY TERM.

SITTINGS AFTER TRINITY TERM.

54 GEORGE III.

SERJEANTS INN HALL.

1814.

Friday,
15th July.

The Court
will not
order money
awarded to a
party to be
paid into
Court on a
petition of
appeal being
signed by
counsel; but
sentile scus if
the appeal
had been
received.

LEWIS v. HARBER.

AN application had been made to set aside the award in this cause, which had been made a rule of Court, and was refused, the Court having previously made an order on the plaintiff to pay the money to the defendant according to the award, and the plaintiff had since appealed against the refusal of that application.

Dowdeswell now moved for leave to pay the money into Court to await the event of the appeal, and stated that the petition had been signed by counsel, but that the appeal had not yet been received because the plaintiff was out of time to present it this session.

The Court therefore refused the present motion, but seemed to be of opinion that if the petition had been received by the Lords, there would have been reason for allowing the motion, on the ground that the money ought not to get into the hands of the defendant pending the appeal.

MENZIES

MENZIES v. F. J. RODRIGUES, DE PAIVA, and
B. J. RODRIGUES.Saturday,
16th July.

A BILL had been filed to restrain the defendants from proceeding at law against the plaintiff, in two actions which had been commenced by them, one in the name of *Rodrigues* and Son, and the other in the name of *De Paiva*, to recover the proceeds of sale of 129 bags of cotton which the plaintiffs had sold, as they alleged, for and on the account of *Rodrigues* and Son, as their agents, under a consignment of these goods to them by *De Paiva*, in their absence from England. And they set up an equitable set off against *Rodrigues* and Son, for the amount of goods consigned to them for sale, at Oporto, of which they had not rendered any account.

A plaintiff having obtained an injunction to restrain proceedings at law cannot be called on to pay into the Court the sum demanded at law, on an affidavit of equitable grounds, by one of the defendants, the answer of the others not having come in,—nor will the Court, alternately, dissolve the injunction.

All the defendants had appeared but *De Paiva*, and *B. J. Rodrigues*, who resided abroad, and therefore the injunction had gone against them.

F. J. Rodrigues, who was in England, had put in his answer, which stated that the goods belonged to *De Paiva* exclusively, and had been consigned to the defendant *F. J. Rodrigues* alone, and he admitted the consignment by plaintiffs to *Rodrigues* and Son at Oporto, but denied that the plaintiffs had been employed as their agents for selling these goods of *De Paiva*.

1814.

MENZIES
v.
RODRIGUES
and others.

On the coming in of this answer of *F. J. Rodrigues*, it was yesterday moved as of course, on the part of all the defendants, to dissolve the injunction, but no order *nisi* having been previously obtained and served on the plaintiffs, that motion was refused with costs.

Dauncey, and *Wilson*, now moved on the part of the defendant *De Paiva*, that the plaintiffs should be ordered to pay into Court the sum of 2,597*l.* 2*s.* 7*d.* received by them for the use of the defendant, the produce of the cotton sold on his account, or that in default, the injunction might stand dissolved, without further order.

The present application was made on an affidavit of the defendant *F. J. - Rodrigues*, which substantially corresponded with his answer, and concluded with a statement, that to his belief, the answer to be put in by the defendant *De Paiva* would not afford any other information beyond that furnished by the deponent's answer.

It was now urged by the defendant's counsel, that this was an attempt on the part of the plaintiffs to keep in their own hands the money produced by the sale of these cottons, on pretence of their being accountable to *Rodrigues* and Son only, against whom they had a set-off; and that if such a bill were maintainable it might be carried so far as to affect an indefinite number of consignors of goods to any single house.

[GRAHAM,

[*Graham, Baron.* This injunction is gone on merits, and no facts are brought before the Court on which we can set it aside. The answer should have shewn grounds for such a proceeding.]

1814

MENZIES

v.

RODRIGUES
and others.

There have been instances where the Court have ordered a plaintiff to pay money into Court, although the injunction has not been dissolved. *Potts v. Butler* (*a*). *Peters v. Erving*, cited in *Sholbred v. Macmaster* (*b*).

Martin, & Roupell, opposed the motion, as subversive of the practice of the Court, this being an attempt to effect, by a subsequent affidavit, what could not be done by the defendant's answer, and contended, that before the injunction could be dissolved the defendants should shew the Court that *De Paiva* would sustain an injury by its continuance;—that it did not appear that *Rodrigues* and Son were not accountable to *De Paiva*, or that *De Paiva* had not been satisfied, whose answer, when it should come in, they would have a right to use, and it might decide this question in the plaintiff's favour.

Dancey, in reply. The facts contended to be required to be stated by the defendant, are already stated by the affidavit of the plaintiff. *Rodrigues*, at least was bound, in common honesty, to bring the action for these proceeds. The defendants now only ask the alternative of dissolving the injunction,

(*a*) 1 *Fowler* 127.(*b*) 2 *Anstruther* 366.

or

1814.

MENZIES

v.

RODRIGUES
and others.

or having the amount paid into Court, where it would be safe, and the plaintiffs ought not to be allowed to retain this money in their hands till *De Paiva* has answered.

[*GRAHAM, Baron.* We ought not to call on merchants in this way, and take a large sum of money out of their hands to their great inconvenience, because they have a lien on it.]

The plaintiff's lien in this case is not for a debt due from the defendants, but for their misconduct in neglecting to sell goods consigned to them for that purpose, a lien for consequential damages. *De Paiva* ought not to have been made the subject of this joint bill.

THOMSON, Chief Baron. It seems to me that the motion, as now made, is merely an endeavour to substitute the answer of one defendant in lieu of those of the others, which are not come in. By answer, I mean this affidavit. There is no objection on the face of the bill, if the facts are true, to inferring an equity against *De Paiva*. He might have demurred without signature if an equity had not been inferrible; and if he had been improperly mixed with other defendants, that would also have been good ground of demurrer. The bill is verified by affidavit, reducing it to the common case of an injunction obtained against a defendant residing abroad who has not put in his answer. Here is no attempt made to dissolve the order for any insufficiency in the plaintiff's affidavit.

davit. The plaintiff has a right to know how matters really stand between the several defendants. We cannot give any opinion as yet on the merits. That can only be done when all the answers have come in. The present motion is clearly irregular.

1814

MENZIES

v.

RODRIGUES
and others.

GRAHAM, Baron. It is of vast importance that the rules of practice should be distinctly known.— We must take it that there is equity on the face of the bill, because there is no demurrer. The plaintiff's affidavit shews an equity against *De Paiva*, and then the injunction goes against him. A motion is afterwards made to dissolve that injunction, which is refused; and then an attempt is made to effect the same object by an affidavit, and such a mode of proceeding is irregular. The defendant, who cannot stand on the merits of his answer, tries the experiment of an affidavit, by which he calls on a merchant to pay into Court a large sum of money, or that the injunction may be dissolved. They would use this affidavit to contradict the affidavit of merits of the bill, and thus we should be obliged to hear the whole merits of the cause on affidavits. The time of the Court has been unnecessarily occupied by this motion, which is totally without foundation.

RICHARDS, Baron, absente.

Motion refused.

1814.

Friday,
24th July.

Equitable
mortgagees,
under a
deposit of
title deeds by
way of pledge,
cannot effect
a valid assign-
ment of the
premises com-
prised therein,
in the event
of the person
so pledging
them becom-
ing bank-
rupt, unless
the assignees
of the bank-
rupt join in
the convey-
ance, although
a power of
sale be given
by the agree-
ment entered
into at the
time of the
deposit, on
notice to
repay the
money in-
tended to be
secured, if no
such notice
has been
given.

HAWKINS v. RAMSBOTTOM & CO.

BY indenture of the 26th of August 1809, made be-
tween *Matthew Phillips*, of the one part, and *Samuel
Hawkins* and *Henry Phillips*, of the other part, re-
citing a proposal on the part of the said *M. Phillips* to
deposit the deeds thereafter mentioned in the hands
of the said *Samuel Hawkins* and *H. Phillips*, for se-
curing certain sums, amounting to 3,000*l.* it was wit-
nessed, that he had accordingly deposited with them
two indentures of lease, of certain leasehold premises
at *Brighton*, and the subsequent assignments, and cer-
tain articles of agreement; to hold the same, and all
beneficial interest, right, title, and property therein,
and to the hereditaments and premises, and resulting
advantages comprised in the same respectively, unto
them the said *Samuel Hawkins* and *H. Phillips*, in
as full, &c. Covenant that the said indentures, &c.
should not be redeemed until payment of all money
and interest, due, &c.; and that in case they should be
desirous of calling in the said money, it should be
lawful for them so to do, upon giving six months
notice in writing to the said *M. Phillips*, within which
space he undertook to pay all principal and interest,
and in default, that the said *S. Hawkins* and *H. Phillips*
might sell and dispose of the hereditaments
and premises comprised therein, and discharge pur-
chasers by their receipt.

By indenture of the 16th of April 1810, the said
S. Hawkins and *H. Phillips* assigned the several sums
of money secured by the said several indentures to
Ramsbottom & Co. upon trust, for securing a balance
of accounts, and appointed the said *Ramsbottom & Co.* their attorneys.

In

In May 1811, a commission of bankrupt issued against *Matthew Phillips*, and in June following his estate and effects were seized and assigned to *John Newman*, one of the defendants. In the next July, *Newman* was discharged from being the assignee by order of the Lord Chancellor, on petition, and a new choice of assignees was directed to take place, but no assignment was ever executed.

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TOM & Co.

By a decree of the Court, made in this cause the 24th of January 1812, it was ordered, that the defendants should be at liberty to sell the premises before the deputy remembrancer, and they were accordingly sold; and the Commissioners for the Affairs of Barracks became the purchasers, and paid the purchase money into Court. But they having objected to the deputy remembrancer's report of the validity of the title, suggesting that the assignees of the bankrupt were necessary parties to the assignment of the premises to them, and that objection being over-ruled, the solicitor for the commissioners filed their exceptions. The defendants then obtained an order *nisi* for confirming the report: and cause having been shewn,

Thomson, Chief Baron, now delivered the opinion of the Court. After stating the case, and setting out the different deeds.—These exceptions depend on the effect of the assignment of the premises, and the power of sale given by the bankrupt to *Hawkins & Phillips*. It is contended on the part of the Commissioners, that on this title of the Ramsbottoms, no good and effectual assignment can be made by them, without the concurrence of the assignees of the bankrupt, and their joining in the conveyance of the premises. That must depend on the effect of the deeds. It does not appear that in point of fact any anterior assignment of the premises comprised

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comprised in the lease ever took place: the whole was done by way of deposit or pledge. Certainly, according to the rule now prevailing in equity, a deposit of title deeds amounts to an equitable mortgage, and the mortgagee retaining such security is not entitled to be admitted to prove as a creditor under the commission. But the question is, whether the title is free from claim by the assignees of *Matthew Phillips*. The power of sale is given to *Hawkins & Phillips*, in the event of the money due to them not being paid, upon their giving *Matthew Phillips* six months notice in writing to pay it off. Now, it is not contended that any such measures have been taken. When the deeds were pledged, it was agreed that in default of payment of the money they should have power to sell; but for what purpose? to repay the money which should be ultimately due. The only question is then, whether to complete the title here to a purchaser, the assignees of the bankrupt are material parties to the assurance. And as there is nothing to bar them of their equity of redemption, their concurrence is necessary to the conveyance of the premises. There was a time when *Newman* was chosen assignee, and he might then have conveyed; but as that assignment was inconsistent with the interest of the general creditors, on an application to the Chancellor he was removed, and no assignment has since been made. Therefore, as there can be no effectual title without the concurrence of the assignees of the bankrupt, we are of opinion, That

The Exceptions must be allowed.

END OF THE SITTINGS AFTER TRINITY TERM.

REPORTS
OR
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

MICHAELMAS TERM,—55 GEO. III.

HOPE v. ATKINS.

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Friday
11th Nov.

TAUNTON, W. E. applied to the Court for a rule to shew cause why the verdict which had been found for the Plaintiff at the last Assizes for the county of Oxford should not be set aside, and a new trial granted, on the objection that evidence had been then rejected, which he submitted ought to have been received.

Parol testimony, though offered merely to explain a written memorandum, and not in any way varying or altering the terms of it, is inadmissible.

The action was *assumpsit* for goods sold and delivered. On the trial it appeared that a person of the name of *Kersey* had agreed, on the part of the defendant, to purchase of the plaintiff a certain quantity of barley; and that a memorandum of the bargain was made in writing at the time, by the

The Court will not, on a motion for a new trial, hear an affidavit of any facts which might have been brought forward at *Nisi Prius*.

L

parties,

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parties in these words: " Bought of Mr. *William Hope*, of *Fullbrook*, about seven quarters of " barley, at 77*s.* per quarter, as per sample, and " 100 quarters of barley, at 50*s.* per quarter, and " 6*l.* again, except the quantity should not be " sufficient to make the 100 quarters up, excluding " a small rick, which is preserved for seed for the " year 1814, which are to be delivered in the course " of a month; the money to be paid on delivery " if required.

" *Saturday, October 2, 1813.*"

The counsel for the defendant attempted to shew by the evidence of *Kersey*, that he had expected that the whole of the barley to be delivered conformably with the agreement, would have proved to be similar in quality to that which had been pulled from the rick, and shewn by way of sample: but the Judge, (Mr. Baron Richards) was of opinion, and ruled, that such oral testimony could not be admitted in explanation of, or addition to, the written memorandum; and that the parties were absolutely bound by its import, and subject to such terms alone as were to be collected from its contents.

In support of the present motion, the scope of the argument was, that the doctrine deducible from the cases which seemed to establish, in many instances, the principle of excluding parol testimony in aid of written evidence, did not extend to the rejection of such oral proof as would merely and consistently explain a written document, without in any degree

degree varying or impugning it; and that on the contrary, there were cases which intrenched on such an extension of the rule. In *Bateman v. Phillips* (a), where the defendant had promised by letter to pay the debt due to David Williams, in consideration of plaintiff forbearing to sue;—the objection taken was, that the letter not containing the whole of the purposed agreement, and requiring parol evidence to explain it, came within the 4th clause of the Statute of Frauds; but the Court held, that as the parol testimony did not extend the terms of the agreement, it did not bring it within the Statute. So, in *The King v. The Inhabitants of Laindon* (b), the pauper had been admitted to prove facts, explanatory of the unstamped agreement, under which it had been contended, that he had become an apprentice. On proof of those facts the agreement was shewn to be in effect a contract of apprenticeship, not of hiring: and, on the hearing of the case, the Court held that such evidence not being contradictory to, but explanatory of the agreement, had been rightly received.

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THOMSON, Chief Baron. This seems to be a plain and common case. It has been frequently held to be a settled rule, that nothing parol shall be received in addition to any agreement which has been reduced into writing. In *Meres v. Ansell* (c), the attempt made before Lord Mansfield was not to contradict but to modify the agreement.—Here, the parties having set down the terms of the

(a) 15 East 272.

(b) 8 T. R. 379.

(c) 3 Wils. 275. *Sed vid. Cuff v. Penn*, 1 Maule & Selwyn, 21.

contract

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contract in writing, nothing ought to have been received in evidence, in addition to those terms, by which their interpretation might be qualified: and therefore I think my brother Richards right in the course which he adopted at *Nisi Prius*.

GRAHAM and WOOD, *Barons*, concurring,

Rule refused *.

An affidavit was tendered to the Court, stating among other things, that the barley had been injured by a threshing machine; but it was rejected as an attempt to bring forward facts which should have been used at *Nisi Prius* only.

* Vide *Powell v. Edmunds*, 12 East, 6.

Same Day.

The Court
will not
change the
venue in any
case where a
trial has been
had.

A NEW trial having been ordered in this cause, *Dauncey* moved to change the *venue* from *Surrey* to *Middlesex*, on an affidavit of the plaintiff's attorney, that all the plaintiff's witnesses resided in *Middlesex*, and, as deponent believed, the defendant's also; but

The Court observed, that the circumstances set forth in the affidavit were not sufficient to induce them to accede to the application, even if a trial had not been already had; and they decided generally, that they could not, in any case of a new trial, direct the *venue* to be charged on an *ex parte* application.

Per Curiam.

Motion refused.

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EDWARDS v. HOGARTH.

Tuesday,
22d Nov.

MOTION for an injunction, on opening a material exception to the defendant's answer.

Looat, admitting the exception to be material, contended, that as the plaintiff not having filed his exceptions in due course, had been permitted to file them *nunc pro tunc*, there was no case or instance in practice to be produced of an injunction having been applied for and granted under such circumstances ; and he distinguished this case from that of a defendant being in contempt for want of appearance or answer.

Where exceptions have been filed, *nunc pro tunc*, the Court will not grant an injunction on opening a material exception, unless the plaintiff, on obtaining his order, give a four-day rule for arguing the exceptions.

On the other hand it was submitted, that this motion was consistent with the terms of the order, and the answer being excepted to, could not be proceeded on, and the parties must be considered therefore as being in the same situation as if no answer had been put in.

The Court, after conferring with the Officer, intimated that the Plaintiff was at present irregular, in not having adopted the proper course on obtaining his order, which was to have given a four-day rule for arguing the exceptions.

The Plaintiff accordingly withdrew his motion.

*Monday,
November 28.*

THE ATTORNEY GENERAL v. BORRODAILE.

The ownership of trading vessels let to freight is a trade, or concern in the nature of trade, within the meaning of the 46th Geo. 3.

The part-owners of such ships are special partners.

The ship's husband, or managing part-owner, is bound to make a joint return of the aggregate profits of the concern to the property tax.

A N information had been filed against the defendant in Michaelmas term, 1813, at the suit of the Crown, to recover the penalty under the 46th Geo. 3, for omitting to make a joint return to the property-tax as directed by that act.

The first count of the information stated that the defendant was a person carrying on a trade, adventure, and concern in copartnership with certain other persons, to His Majesty's Attorney General unknown, in a certain ship called the *Elphinstone*, in the ward of *Langbourne*, in the city of *London*, and that he and the said persons so carrying on such trade, &c. became chargeable to certain duties, payable to his Majesty, under the act of 46 Geo. 3, ch. 65, (*setting out the title*): That the defendants, at the several times in that, and the next following count mentioned, was the precedent acting partner in the said trade, &c. and who, as such acting partner, ought, according to the forms and directions of the said act, to have prepared, and delivered, on the behalf of himself and his partners in the said trade, &c. a return in writing, of the amount of the profits and gains arising to them therefrom.—That before, and at the time of the committing the offences after mentioned, to wit, on the

the 9th of *April*, 1812, one *John Lyon* was an ^{1814.} ~~assessor~~ for the duties chargeable under the said ~~act~~ ^{ATTORNEY} ~~GENERAL~~ of Parliament, for the year commencing from ^{v.} ~~the 5th of April 1812, and ending on the 5th of April 1813;~~ ^{BORRO-} ~~DAILE.~~ and that the said *John Lyon*, before the time of the committing the offence, according to the form and directions of the said act, on the 9th of *April* 1812, gave the said defendant, and left at the house where the said trade was carried on, in the ward aforesaid, the usual notice (setting it out) requiring him to fill up and deliver to the said *John Lyon*, at the Office of the said commissioners, such of the forms therein stated as were applicable to his case, averring that one of such forms was the form of a return of the gains and profits arising from property or profits not coming within any of the foregoing heads, except lands, &c. or other property of which no return was required to be made, and that another of the said forms was the form of a declaration to be made by a precedent acting partner, in the firm of persons carrying on trade, &c. in copartnership, according to the directions of the said act; and that one of the said forms was applicable to the said profits of the said trade, &c. but that defendant, &c. and that at the time of exhibiting of this information, neither defendant and the said other partners, or any or either of them, had been in any manner assessed to the said duties for or in respect, &c. whereby defendant forfeited the sum of 50*l.* they nor either of them, having been assessed at double the duty for which, &c.—Second count differed in setting out the notice

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in substance only, not at length.—Third count in describing defendant as the partner first named in the instrument of partnership.—Fourth count differed from the third, as the second from the first.—The fifth count laid the joint trade, &c. as carried on under the firm of *W. Borrodaile*, and averred that defendant as the partner named singly ought to have made the return for himself and his partners therein ;—and the sixth count differed from the fifth as the fourth had done from the third.—Plea, General Issue.

At the trial before the late *Lord Chief Baron*, at the sittings after *Michaelmas* term, 1813, the Jury found a verdict for the Crown for one penalty, subject to the opinion of the Court on the following case :

That at the times mentioned in the information the defendant was a part-owner in the said ship *Elphinstone* therein mentioned, and jointly interested with others in the profits of the said ship, which at those times was chartered to the *East India Company*, and employed by them ;—that at those times there were some profits and gains arising from such employment of the said ship, which said defendant contends are not chargeable on all her owners jointly, as partnership profits ;—that at the several times in the information mentioned, the following persons were owners of the said ship, *viz.* the defendant *Wm. Borrodaile, Richardson Borrodaile, Robert Hudson, Sir James Sibbald, Bart.*

John

John Griffiths, Captain Millikin Craig, Messrs. 1814
Thomas Todd, & C. A. Ferguson, T. Lester, Arch. ATTORNEY
Paxton, J. Allen, the executors of Dr. Adams, de- GENERAL
ceased, W. Bawtry, Messrs. T. Bailey and Dan. v.
Barber, and Messrs. S. and D. Brent ;—that on
 the 10th of *January* 1803, the *Elphinstone* was
 owned by and registered in the names of *Moses*
Agar, James Alley, the Right honourable Lord
Keith, the said *T. Lester, A. Paxton, James Sib-*
bald, John Griffiths, N. Allen, deceased, and the
 said *T. Allen*, the said *W. Bawtry, David Gordon,*
John Biddulph, and *W. Stanley*, the said *T. Bailey,*
W. Bailey, and *D. Barber*, the said *Dr. Alex.*
Adams, G. V. Nemburg, and the said *T. Todd* and
C. A. Ferguson, and *John Howes*, deceased, and
 that the same now belong to the owners first named,
 under ten changes by transfers and deaths in the
 several years 1806-7-8-9 and 11.—That the de-
 fendant at the said several times mentioned in the
 information, was managing or acting part-owner,
 and husband of the said ship, and in receipt of all
 the earnings thereof in the first instance; and that
 he, together with the captain of the said ship, and
 one of the other owners chartered her to the *East*
India Company.—That the defendant gave orders
 for the repair of the ship, had the management
 of her disbursements in the same way that an
 ordinary ship's husband has, but each part owner
 insured his own particular share, at his own sepa-
 rate expense, or remained uninsured, as he thought
 fit:—That a commission and other advantages were,
 payable and allowed by the general owners of the
 ship

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ship to the managing owner or husband: That the business of the said ship was conducted at the counting-house of Messrs. *W.* and *R. Borrodaile* and Co. (which firm consists of the defendant, the said *Richardson Borrodaile* and *Robert Hudson*, and of which the defendant was the precedent acting partner) situate in the ward of *Langbourne* aforesaid:—That the defendant as managing owner or husband accepted all bills drawn on the said ship, and gave receipts and checks on his bankers on account of the ship, and acted in all other respects in the management of the said ship:—That there was no copartnership name, style or firm under which the concern of the general owners of the ship was carried on; nor any other deed, instrument, or agreement of copartnership between the part-owners, or any of them, than such as the above facts in the opinion of the Court shall prove:—That the notice papers were served on the defendant as mentioned in the information:—That the said *John Lyon* was such assessor, as is therein mentioned:—That the profits of the said ship, if chargeable at all to the defendant, were chargeable in the ward mentioned in the information:—That the defendant made no return of the profits, and gain arising to himself, and the other part-owners of the said ship, jointly and in one sum; but he returned the profits of his own and partners shares:—That the defendant is part-owner in other *East India* ships, with divers other persons, some of whom are, and some are not, part-owners in the *Elphinstone*, on which losses accrued during the same

same year in which the aforesaid profits were made
by the *Elphinstone*.

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22 June.

This case was argued in last Trinity term, by

Abbott, on the part of the Crown, &

Maryatt, for the defendant.

The Court desiring a further argument, it was
accordingly re-argued in the next *Michaelmas*
term by

18 Nov.

Dauncey, in support of the verdict, &

Martin, contrà.

The questions arising on this case were stated
and admitted to be,—First, Whether, by the terms
of the act, the part-owners of a ship, were required to
make a joint return of the aggregate profits made
by them, conformably with the accustomed course
in the case of acknowledged partnership concerns,
—or whether it was competent to each part-owner,
to make a distinct and several return of the profits
made by him, in his particular share;—and secondly,
(if the Court should decide that a joint return was
required) whether the defendant, as managing part-
owner, or ship's husband, was the person called on
by the act, to make that return.

It was submitted by the Council for the Crown to
be

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be a question of considerable magnitude, as affecting the interests of the revenue; for that by the Court putting such a construction on the Act, as would, in future, enable the assessor, to resort to the person among the various owners of the shipping interest, who should be found in the situation of the defendant, for a joint return on the aggregate profits made by the concern up to the particular period, the Crown would acquire the very material advantages, of facility in discovering the owners (which was now, notwithstanding the provisions of the Register Act, extremely difficult) and of certainty, in fixing the true amount of the ships earnings, which so many individual returns had been found never wholly to furnish—facilities, which it must have been the intention of the Legislature, to have afforded, by requiring from among such scattered interests; that a joint return of the amount of their general profits should be made by the person managing the concern. The points insisted on in argument for such a construction were,—that the nature of the tax, (as affecting such union of property as that of the ownership of vessels is) required a simple mode of ascertaining the profits, which should obviate the difficulties arising to the collection of the tax, amidst such a complication of interest. That was contended to be the principle and object of requiring a joint return at all; and such property as this could never be supposed to have been privileged by exemption from the requisitions of this Act. On the contrary, the statute has embraced every species of property as comprehensively as possible; and it has provided against the possibility of a doubt, by extending itself not only

only to all trade, but to every concern in the nature of trade. And lest the clause affecting such concerns should be dubious or equivocal, and liable to misconstruction, there are certain rules for ascertaining its application to particular cases, the third of which directs that "the computation of duty arising in respect of any trade, manufacture, adventure or concern, or any profession carried on by two or more persons jointly, shall be made and stated jointly, and in one sum, and separately and distinctly from any other duty chargeable on the same persons, or either, or any of them; and the return of the partner who shall be first named in the deed, instrument, or other agreement of co-partnership (or where there shall be no such deed, instrument or agreement, then of the partner who shall be named singly, or with precedence to the other partner or partners, in the usual name, style or firm of such co-partnership; or where such preceding partner shall not be an acting partner, then of the preceding acting partner) and who shall be resident in Great Britain (and who is hereby required under the penalty herein contained, for default in making any return required by this Act, to make such return on behalf of himself, and the other partner or partners whose names and residences shall also be declared in such return) shall be sufficient authority to charge such partners jointly: provided always, that where no such partner shall be resident in Great Britain, then the statement shall be prepared and delivered by their agent, manager or factor resident in Great Britain jointly, for such

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" such partners ; and such joint assessments shall be made in the partnership name, style, firm or description ; and no separate statement shall be allowed in any case of partnership, except for the purposes of the partners separately claiming an exemption or allowance as herein directed, or of accounting for separate concerns." Then follows a provision, that if any partner entitled to be charged at different rates, or to any exemption or allowance, shall declare the proportion of his respective share in such profession or concern, in order to a separate assessment; it shall be lawful to charge them separately: whereby any inconvenience that might have been complained of, as arising from such joint assessment, is obviated. From the first part of this rule, it is obvious, the Legislature intended that a joint return should be made in all cases of partnership; and that intention is made more manifest by analogy with the case of quarries, mines, and iron works chargeable under Schedule A. the duty in each of which, being chargeable on the person or persons, corporations, &c. carrying on the concern, or their officers having the direction or management thereof, or being in the receipt of the profits thereof,—Then the computation of the duty is directed to be stated jointly in one sum; and each adventurer is permitted to set his losses in one concern against his profits in another.

It was next argued, that the defendant was within the Act, as being the precedent acting part-owner and manager of the concerns of the ship. Although it is stated in the case, that there exists no deed

deed of copartnership between the owners, they are all, nevertheless, as far as respects the profits and trade of the ship, partners—many of the legal consequences of the relation of partnership attach to them—actions must be brought by, and against all of them ; and if they are to be considered partners, or *quasi* partners, that person amongst them who conducts the business of the ship,—who gives orders for purchases, repairs, &c.—makes all disbursements, and receives, and finally apportions the profits, is the precedent acting partner, and liable to make the joint return required by the Act. And such person this defendant is ; he should therefore have made the necessary return, and not having done so, has incurred the penalty, for which the information has been filed.

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On the behalf of the defendant, the affirmative position on both questions was denied ; and it was insisted that the instance of part-owners of ships, must be considered as a *casus omissus* in the act. Either the Legislature had not intended, that part-owners of ships should be called on to make a joint return, or if they had, the framers of the Act had not employed such language, as was sufficient, and necessary to give legal effect to that intention, which alone would be an answer to the present information.

The question here is not, whether the profits of shipping be chargeable at all ; (the defendant having, as appears by the case, returned his share in the profits as part of his general commercial concerns),
but

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but whether the return of those profits should be joint, —and the peculiar difficulty of the burthen of making such a joint return, with which any individual, called on for that purpose, would have to contend, must be considered a forcible objection to the imposing such a duty on any one person amongst them. It is the nature of this property to be continually liable to sudden change of owners, which is effected by a mere endorsement on the register, and the consequence is, that the ship's husband, cannot know who are connected with him in the ownership, nor has he any control over their conduct.

There are three points of objection to the present verdict. A shipping concern is not a trade, nor in nature of trade. The owners of shipping are not partners; nor is there any one individual in such concerns who can be said to come within any description of character pointed at by the act as the person who is required to make the joint return.

It cannot be considered a trade, because they have no common stock as part-owners, which is the subject of traffic. They are not in the habit of buying and selling, nor are they subject to the bankrupt laws, as has been decided by the present Lord Chancellor(*e*). They are in somewhat the same situation with two or more persons who are proprietors of a dwelling-house which they let out to others.

They are not partners, inasmuch as they have no

(*e*) *Ex parte Bowes*, 4 Ves. 168.

joint

joint stock ; neither have they any community of interest, as where each has a control over all the partnership property. In the case of *French v. Backhouse* (*f*) it was decided, that a direction to insure, given by one part-owner would not bind the others. None, therefore, of those essential qualities of a partnership attach to the part-owners of a ship.

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Then another objection to making a joint return is, that it would render it impracticable for any individual part-owner to set his loss or profit on his share of the ship, against his profit or loss in another concern ; nor can due notice be taken by the ship's husband of the various separate insurances, or of the amount to which each part-owner may have thought it prudent to insure ; and the consideration of such difficulties may, probably, have induced the Legislature to exempt ship-owners altogether from the necessity of making a joint return.

If, however, it should be decided that they are within the act, and compellable to make such a return, still the individual part-owner in the situation of this defendant is not designated by the act as the person liable to be called on to do it. He has the mere management of the ship, by the appointment of the rest ; he receives a commission on the profits, and is supersedable at pleasure.

Here is no copartnership, name, style or firm under which the concern is carried on ; nor is there any deed, instrument or agreement of copartnership interchangeably executed between the owners. And

(*f*) 5 Bur. 2729.

M

therefore,

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therefore, as among part-owners of ships, there is no one person selected by the act to make the joint return, the penalty sought by this information cannot have been incurred, and ought not to be recovered.

To these arguments for the defendant, it was replied: That the Legislature had exploded all cavil *in limine* as to the technical definition of "trade" by adding the supplemental words. And in common parlance these are denominated trading ships:—That it was not essentially necessary to constitute a partnership, that the object of it, or common stock, should be the subject of traffic; for factors might be partners, and an agency might be the subject of a copartnership:—That the frequent or sudden change of owners made no difference; as whoever they might be, they must ultimately come to an account, and the balance may be set out after all deductions:—That the inconveniences suggested were guarded against by the several express provisions of the act:—That there are many existing partnerships without name, style or firm, as in the case of country banks which take their description from their place of business;—and that some concerns were carried in the name of persons not in being, as the house of Messrs. *Child*.

Cur. adv. cult.

Monday,
November 28.

THOMPSON, *Chief Baron*, this day pronounced the concurrent opinion of the Court; when his Lordship, having gone through the several counts of the

the information, and the whole of the facts of the special case, thus proceeded :

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The question now before the Court is, whether the defendant *Wm. Borradaile* has incurred either of the penalties under the statute of the 46th *Geo. 3. ch. 65*, for not making a return to the property tax; and if the Court shall be of opinion that he has, a verdict is to be entered for the Crown, for any one such penalty as he may be deemed liable to, and for the defendant as to the rest: but if the Court shall be of opinion that he is not so liable, then the verdict is to be entered generally for the defendant.

Now the question of the defendant's liability depends wholly on the construction to be put upon the act of Parliament of the 46th of *Geo. 3*, where, under schedule D, certain duties are directed to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the act. [His Lordship here adverted to the third rule, already transcribed, which he read at length, and observed, that the penalty there referred to, was that which was sought to be recovered by the present information.]

Our first inquiry will be, whether the joint ownership of shipping employed in trade; (here the ship was employed in trading to the East Indies,) is a trade, or concern in the nature of trade, or not. If it be so, it will then become necessary to inquire

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whether the profits, arising from such concern, be to be returned jointly, according to the terms of the act, that is, if there is a partnership firm, in the name of the partner first named, or if there be none, in the name of the precedent acting partner;

As to the first question, whether this is a trade, or concern in the nature of trade, within the meaning of the act of Parliament. It is necessary to the carrying on the commerce of this country, whose shipping interest is of the utmost magnitude, that the ownership of the several vessels should be frequently subdivided into many separate shares; (for otherwise it could not be carried on to its present extent, and particularly that branch of it which relates to the East India trade, where many owners unite on the terms that the profit and earnings of the ship shall be reciprocally divided,) and it appears to us that such a concern is a trade, or at least in nature of a trade. Now, if it be a trade, it seems difficult to contend, that the joint ownership of ships of this description is not a partnership in the trade in which they are engaged. It may be considered to be a special Partnership. To constitute such a partnership, it is not necessary that all the persons engaged in a ship should have the power to bind each other by drawing or accepting bills, nor is that, in fact, a consequence of the joint ownership of vessels divided amongst many, as this ship was.

But to many purposes they are Partners. If one of them be sued as an owner he must plead the rest of his partners in abatement:—They have among

among themselves a reciprocal lien on the shares of ^{1814.} one another, for disbursements made, beyond their proportion of the ship's expenses ; and I take it, that, if an execution were to issue against any one ^{v.} of these part-owners, the sheriff must sell the ^{BORRO.} share of that part-owner, subject to the liens of his copartners.

It seems, therefore, that this is a Trade, or concern in the nature of trade, and that the persons interested in it come properly under the denomination of Partners in that concern.

There is an authority to this point, which supports both these propositions, and is to be found in the case of *Doddington v. Hallet*, (g) in the time of Lord *Hardwicke*, who lays it down expressly, that " a ship may be the subject of a partnership " as well as any thing else, the use and earnings " thereof being a proper subject of trade, and the " letting a ship to freight as much a trade as any " other ;" and on that he proceeds to determine that the share of the part-owner is liable to the debts contracted for the expenditure of the ship in preference to his other separate debts.

As to the power of these part-owners among one another, (and this is put by way of illustrating the nature of the partnership subsisting between them,) it certainly is clear that the majority of owners can send the ship to sea without the consent of the rest ;

(g) 1 Vez. 497.

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and if they do so, and a loss happens, the others have no claim upon them in respect of the loss sustained:—They have only a cautionary remedy, by citing the owners who wish to send the ship to sea, in the Admiralty Court, and taking security from them for the return of the ship, to indemnify themselves against the loss which they might otherwise suffer.

Taking this to be plain, as it appears to us to be, the next question is, whether the defendant stands in the situation of the person described by the act of Parliament, as being bound to make a joint return of the profits of the concern.

Now it appears that he is a partner;—he is the acting partner; in which expression the notion of the precedent acting partner is included:—he acts as ship's husband, for which he receives a commission—he transacts all the business of the ship—he receives all her earnings;—and finally divides and apportions the profits among all the other partners.

Under these circumstances, without entering into a detail of the arguments advanced on either side, or making much observation on them, it appears to us, that the defendant falls within the description, in this act of Parliament, of precedent acting partner in a trade, or concern in the nature of trade; and that he ought as such to have made the joint return. In consequence of his not having done so, he has incurred the penalty sought by this information, and that will be the penalty charged on the precedent acting

acting partner, and the judgment should be entered

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Judgment for the Crown on the first count.

THE ATTORNEY GENERAL v. Sir CHARLES

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1814. *See 163 ecc 84-70* COCKERELL, Bart. 2 May. v (3-263 271. 264 Legacies be-
queathed by a British sub-
ject resident in the East Indies, out of his personal estate, to persons living in England, are liable to the duty, if the executor proves the will in England, and pays the legacies here, notwithstanding the testator realized and possessed his property in India,—re-
sided there,—made his will there,—and died there,—and although the executors were in India at the time of their appointment, and the will was originally proved there.

THIS was an information filed against the defendant, at the instance of the Commissioners of Stamps, for the purpose of taking the opinion of the Court, on a question arising on the construction of the Legacy Acts.

The information stated, that the defendant was indebted to the King in the sum of 5,466*l.* 4*s.* 8*d.* which he owed, &c. For that theretofore, to wit on, &c. at, &c. the defendant did take upon himself the burthen of the execution of the will of *Alexander Robertson*, then lately deceased; that the defendant so having, &c. did retain for the benefit of certain strangers in blood to the said *Alexander Robertson*, the residue of the personal estate, of the said *Alexander Robertson* deceased, of great value, to wit, of the value of 17,082*l.* which said residue the defendant then and there became entitled to retain under and by virtue of the said will, whereby, &c. a large sum of money, to wit, the sum of 1,366*l.* 11*s.* 2*d.* parcel of the said sum above demanded for the rates and duties for the said residue so retained as aforesaid, being at and after the rate of 8*l.* for every 100*l.* of the said residue, and so after the same rate for every

1814. greater or less sum become due and payable to his
 ATTORNEY said Majesty from the said defendant. There were
 GENERAL also the usual common counts. The defendant
 v.
 COCKERELL. pleaded the General Issue.

On the cause coming on at the Sittings, a verdict was taken for the Crown, subject to the opinion of the Court on the facts of the case, which were, for the purpose of argument, reduced into the following special verdict:

That *Alexander Robertson*, in the said information mentioned, resided at *Cawnpore*, in the province of *Oude*, in the *East Indies*; and that whilst he was so resident, he made his will in writing, dated the 5th day of *June*, in the year of our Lord 1797:—That the said *Alexander Robertson*, afterwards, in the same year, died in the *East Indies*, without having revoked or otherwise annulled the same:—That the said *A. Robertson* by his said will devised and bequeathed all his real and personal estate to trustees, in trust (after making provision for the mother of his natural children) for his natural children, share and share alike, to be paid and payable on their attaining the age of twenty-one; and appointed General *Patrick Duff*, who then resided in the *East Indies*, and several other persons, one of whom was the said Sir *Charles Cockerell*, then also resident in the *East Indies*, together with other persons residing in *England*, his executors:—That the whole of the personal property of the said *Alexander Robertson* at the time of his death was in the *East Indies*:—That the said General *Duff*, in November 1797, duly proved the will
 of

of the said *Alexander Robertson*, in the Supreme Court of Judicature at *Fort William* in *Bengal*, and possessed himself of great part of the testator's estate :—That General *Duff* afterwards returned to *England*, and brought with him a bill upon the *East India Company* for the sum of 11,896*l.* payable to himself as such executor, for and in respect of such part of the estate of the said *A. Robertson*, as had then come to his hands, which bill was afterwards duly honoured, and paid to General *Duff*, or his order :—That there was afterwards remitted to General *Duff* from the *East Indies*, a bill for 2,920*l.* drawn in his favour upon the *East India Company*, in further part of the said *A. Robertson*'s estate, which bill became due in the life-time of the said General *Duff*, but was not paid until after General *Duff*'s death, and was then received by his executors :—That there was also remitted to Messrs. *Paxton's, Cockerell and Co. Bankers, of Pall-Mall, London*, from the *East Indies*, the further sum of 2,000*l.* on account of General *Duff*, as the executor of the said *A. Robertson*, and in further part of his estate :—That there was also another bill from the *East Indies* for 296*l.* remitted to General *Duff*, as such executor as aforesaid, and in further part of the estate of the said *A. Robertson*; but which bill was not paid until after the death of General *Duff*, and was then paid to his Executors :—That General *Duff* died in the month of *February*, in the year of our Lord 1803, and before any of the natural children of the said *A. Robertson*, in his said will mentioned, had attained the age of twenty-one years :—That the said General *Duff*, at the time of his

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1814. his death, had in his hands, as executor of the
 said *A. Robertson*, and as part of the estate of the
 said *A. Robertson*, the several sums of 11,896.
 and 2,000*l.* making together the sum of 13,896*l.*
 which had been received by him and remitted to
England as hereinbefore mentioned:—That after
 the death of General *Duff*, his executors pos-
 sessed themselves of the said sum of 13,896*l.* and
 also of the further sums of 2,920*l.* and 296*l.* which
 had been remitted to the said General *Duff*, as
 executor of the said *A. Robertson*, and as part of
 his estate, in bills from the *East Indies*, drawn in
 favour of the said General *Duff*, the amount of
 which bills was paid to the said executors, after the
 death of the said General *Duff*:—That after the
 death of the said General *Duff*, the said Sir *C. Cockerell*, one of the executors of the said *A. Robertson*, on the 3d day of *May*, in the year of our
 Lord 1803, and before any of the natural children
 of the said *A. Robertson*, in the said will mentioned,
 had attained the age of twenty-one, proved the will
 of the said *A. Robertson*, in the Prerogative Court
 of the Archbishop of *Canterbury*, in order to obtain
 from the executors of the said General *Duff*, the
 payment of the said several sums of money, part of
 the estate of the said *A. Robertson*, deceased, so
 remaining in their hands as aforesaid:—That the
 said Sir *C. Cockerell* so having proved the will of
 the said *A. Robertson* deceased, did afterwards, as
 executor of the said *A. Robertson*, receive from the
 executors of the said General *Duff* the said several
 sums of money, amounting in the whole to the sum of
 17,112*l.* part of the estate of the said *A. Robertson*

as aforesaid, and which was to be paid under the will to the natural children of the said *A. Robertson*, on their attaining the ages of twenty-one respectively, which legatees are all resident in *Great Britain*:—That the amount of duty, if any, payable to his majesty, under the above-mentioned circumstances, upon the said sum of 17,124. amounts to the sum of 1,368*l.* 9*s.* 2*d.*; but whether upon the whole matter by the jury aforesaid, in form aforesaid, found the said Sir *C. Cockerell* owes to his said majesty the said sum of 1,368*l.* 9*s.* 2*d.* the jury are ignorant, and pray the advice of the Court upon the premises; and if upon the whole matter aforesaid, in form aforesaid found, it shall appear, &c. (finding in the alternative according to the opinion of the Court.)

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Nolan this day argued the case on the part of the Crown; and

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Scarlet for the defendant; when the Court required a second argument.

Dauncey now was heard in support of the verdict, &

Fonblanque, contra.

The Counsel for the Crown urged, as the proposition on which they meant to rely, that, in all cases where he, who has the administration of the effects of a deceased person, receives his authority from a court of competent ecclesiastical jurisdiction in this country, and who, to discharge himself of the payment of legacies made in this country, in the course of

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of that administration, must obtain a receipt in this country, such legacies are within the Legacy Acts.

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The statutes to which the attention of the Court was principally called were the 36th of *Geo. the 3^d*, ch. 52, and the 48th, ch. 149; and particularly the last, on which the question more especially depended.

The 48th enacts that for every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or on the 5th of *April* 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied or discharged after the 8th of *October* 1808, a certain duty shall be charged:—By the 36th, ch. 52, sec. 2, a duty is also imposed on such legacies. The 5th sec. provides the form of receipts; and the 6th enacts that the duty shall be paid by the executor or administrator in all cases where he pays the legacy, or where he retains it for his own use.—Sec. 7th defines what shall be considered a legacy within the meaning of the act, which definition is in very general terms, limited neither to the place of the party's death, nor where the estate is to be found. By Sec. 27 it is enacted, that where the legacy is liable to duty, it shall not be paid without taking for the same, a receipt of a particular description, in writing, duly stamped.—Sect. the 28th goes on to impose a penalty of 10*l. per cent.* on any person taking the burthen of the execution of any will,

will, who shall pay, or compound for any legacy given by such will, without taking such receipt, and causing the same to be stamped within the limited time, and the like penalty on every person receiving such money. So that by express enactment, it is rendered incumbent on each party to give and take a receipt. By adverting to sect. 32 and 33, it will be seen that the Legislature contemplated that the duty might be payable where the legatee was resident out of England, sec. 32, providing that in case of infancy, or the absence from England of the legatee, the money should be paid into the Court of Chancery, deducting the legacy duty; and sec. 33, enabling the parties interested, to compound for the duties, by application to the Court of Exchequer at Westminster, if the deceased resided in England or elsewhere.

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Then, sec. 2, of the 48th of *Geo. 3*, imposes certain duties throughout the whole of *Great Britain*; and sec. 44, empowers the commissioners to cause receipts for the duties to be stamped if brought to the head office for that purpose, after three calendar months, on payment of the duty and penalties; and goes on to state, that where any such receipt or discharge shall have been signed out of *Great Britain*, if it be stamped within twenty-one days after having been received in *Great Britain*, it shall be lawful for the commissioners to remit the penalty; from which it may be collected that the Legislature contemplated, that there might be a payment out of the kingdom, which would subject the parties to a duty; and that where there was an executor

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executor within the kingdom, and executors out of the kingdom, if an executor out of the kingdom paid a legacy to a legatee beyond seas, it would be subject to the duty.

The main points on which the case for the Crown stands are the circumstances of Sir *Charles Cockerell* having proved the will here,—the residence of the legatees here,—and the necessity imposed on Sir *Charles Cockerell*, by the acts of Parliament, of taking receipts for his discharge on payment of the legacies.

It can scarcely be contended to be material, where the will was made, it being ambulatory till the death of the testator. On the same principle, it is immaterial where the testator dies; as it appears from the acts, that, though a party die elsewhere, his personal property being bequeathed, may still be liable to the legacy duty. Nor can the local situation of the personal property of a testator affect the case, provided the persons in whom it vests are within the jurisdiction of this country. That has been frequently decided in cases under the bankrupt laws; and the place of residence of the legatee is equally immaterial, for the same reason, as he also may reside out of the country, and yet his legacy may be liable to a duty.

But leaving General *Duff*, for an instant, out of the question, suppose that Mr. *Robertson* had made his will in the *East Indies*, and had appointed as his executors persons who were resident there, at that time,

time, (as Sir *Charles Cockerell* was,) but who had afterwards come over to *England* before the testator's death;—that the property had been taken possession of, as it usually is, by persons on the part of the *East India Company*, and remitted over here;—and that Sir *Charles Cockerell* had then proved the will,—In that case it would have been the common case of an executor proving a will in this country. The property being brought over into this country would be assets here, and therefore liable to the duty. Nor does it alter the case, that he who has been an executor, and has proved the will there, brings the property home himself. An authority received there in affairs of administration of effects, is not an authority as to this country, nor empowers him to deal with the assets here.

In the case of a common receipt for money paid, the person paying it here, can not be legally discharged but by a stamped receipt produced in court, if the demand should be sought to be recovered; and there can be nothing to distinguish this case from that of an ordinary receipt which is subject to a known duty.

It is very material that some period should be fixed on as the time when we are to look for a coincidence of the circumstances which bring this case within the statute:—That period is the time of proving the will by Sir *Charles Cockerell*:—Then, the executor, the property, the legatees, and the will, were all in *England*, and completely within the terms

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terms of the act, which are general, and without any qualification to narrow their construction.

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On the other side it was contended that this was not a duty on the receipt, but on the legacy; and that the question was, whether this were such a legacy as the act was meant to impose a duty on. In every act indeed, antecedent to this, (the 36th of the King) the duty is laid on the instrument by which its payment is acknowledged; but by this act it is expressly imposed on the legacy. There is, too, a case, noticed in the act, of a receipt not being required to be stamped, and that is, where the duty on the legacy is paid at the office; and in that instance it is provided that a receipt shall be admitted in evidence although not stamped. It must be considered therefore as a duty on the legacy, and not on the paper purporting to be a receipt for the payment of it; and stamp duties in general are imposed on the paper only.

The question appears chiefly to depend on the 2d section of the 36th of *Geo. the 3^d*, and from that it is clearly to be collected, that it is a duty on property; and in every case where the legacy is not liable to a duty, no receipt is necessary. The property in this case had been collected, and converted into money by the trustee in *India*, and it was not necessary that Sir *Charles Cockerell* should prove the will to possess himself of it. Nor should it depend on the caprice of an executor, and not on the law, whether the legacy duty should attach or not. An executor may pay legacies before probate,

probate, and if he might do so then without liability to duty, the circumstance of a probate, as such, cannot render him liable.

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In sect. 27, there is a clause by which it appears that unless the legacy shall be such as a duty was meant to be imposed on, the necessity for taking a receipt on payment of it does not arise; which shews that cases were in contemplation of the Legislature, of legacies being bequeathed whereon there attached no duty. It is that part of the act which directs a receipt to be given for the payment of legacies, or the residue of personal estate, "in respect whereof any duty is thereby imposed,"—from which we may infer that there are cases wherein the Legislature imposed no duty.

It cannot be supposed, that in imposing this tax in this country, it was meant to extend it to other countries, and certainly not where our Legislature has no jurisdiction. Now, the testator, in this case, having lived and died in *India*, was as little subject to British legislation as if he had lived and died in *France*, the acts of our parliament not extending to the British colonies, unless expressly named; and surely it will not be contended, that if a French subject, dying in *France*, makes a will there, leaving his property to his nephews, minors, and his executors transfer themselves and the estate to this country, that transfer shall subject such property to the legacy duty here. The property in that case must be con-

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1814. ATTORNEY GENERAL v. COCKERELL. sidered disposable according to the *lex domicili*, unless the mere technical argument prevail, that our courts of justice do not acknowledge any person an executor, without the fiat of the ecclesiastical court in the first instance.

In the case of a man domiciled in *France*, dying in *France*, having made his will and appointed executors, giving them 100*l.* a piece, and leaving a large residuary estate in *England*, shall it be said, that because the executor is obliged to come into this country, and make probate of the will here, that he can be compelled to make a distribution according to our statute of distributions? Certainly not; for though that statute contain no express exception of any such case, yet it must, in consistency, be taken to be conformable with the general law of nations, and not to disturb the course of distribution of property in countries to which the laws of *England* were never designed to extend.

Perhaps either of the instances of a man dying out of the country, of the place where a legatee resides, where a will made out of this country, or where an executor is appointed, and lives, taken singly, may make no very material difference in this case; but where all those circumstances concur at the time of making the will, or at least of the death of the testator, (for that should be the latest period to which we should refer, and not, as has been stated, the time of proving the will by Sir

Charles

Charles Cockerell) then the coincidence of so many material circumstances becomes important in fixing a criterion. At that time the testator is found to be domiciled abroad; his possessions are abroad; the will and the executors are abroad, and out of the jurisdiction of this country, forming a case altogether excepted out of the statute on which the question arises. If a man, domiciled in England, have a real estate in France, which he charges with a legacy, that legacy would not be subject to a legacy duty by the laws of this country. It would be otherwise, perhaps, if he were merely a mortgagee of property abroad, for he would then be a mere creditor, and that mortgage would be considered part of his personal estate.

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It must be granted, that if the parties had never come to England, though the legatees were living in England, and their attorneys abroad had remitted the legacies to them, there could have been no pretence for charging them with the duty.

This will need not have been proved here; and this is not an original probate of the will, it is merely *de bonis non*; and it is exactly the same as if General *Duff* had paid the money.

The domicilium of the testator is a materially important consideration in the present case, and that was in *India*.

[*RICHARDS, Baron.* Is it quite clear that a British subject can be domiciled in *India*?]

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**ATTORNEY GENERAL v.
 COCKERELL.** Questions have lately arisen on Scotch domicile of the last importance to individuals. A similar question arose in the case of the disposition of the Marquis of *Arundel's* property.

[THOMSON, *Chief Baron*. That was in Scotland.]

The question was, where he was domiciled ; and the *lex domicili* was considered as controlling the disposition of personal property, and the *lex loci* as affecting the real estate. Suppose the executor of a man domiciled in France gets possession of the property, and absconds with it to this country, and the legatees being also domiciled in France, in order to recover it here, apply to our laws, and constitute a personal representative to sue him ; and your Lordships, sitting in equity, decree an account ; must those legatees pay, in that case, the duties imposed on legacies by the laws of this country ? It cannot be understood to have been the intention of the Legislature to impose a duty on property out of their jurisdiction. For these reasons, it seems that the legacies in this case ought not to be considered as liable to the duties imposed in the usual cases.

In reply the analogy between this case and that of a French executor put on the other side was denied ; and it was contended, that whether in that case the duty would be chargeable or not, must depend on the source of the claimant's title.

[RICHARDS,

[*RICHARDS, Baron.* If a foreign executor should find it necessary to institute a suit here to recover a debt due to his testator, a personal representative must be constituted to administer *ad litem*, and the Court would be bound in such case to attend to the claims of the Crown.]

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v.
COCKERELL.

In this case, if Mr. *Duff* had paid the money in this country without a receipt, it would have been a fraud under the act; and all persons in the situation of Sir *Charles Cockerell* must seek their discharge under the provisions of this act. The argument is ingenious, that this is a duty on the legacy, and not on the receipt; but though the act has provided, that in certain cases evidence may be admitted of the duty being paid, without producing a stamped receipt, yet that is only in case the actual receipt is lost; but the act requires that there shall be a receipt in all cases, and that it shall be subject to a duty.

It has been argued that the Legislature could not mean to tax property out of the jurisdiction of this country, as in cases where the party resided elsewhere, and their property was situated there: Certainly not; but in this case the testator himself was within the jurisdiction of this country, and his domicile will not affect this question; nor can there be any distinction taken between the case of this executor and any other.

THOMSON, Chief Baron, giving judgment, (after
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**ATTORNEY
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v.
COCKERELL.** taking a review of the proceedings and special case,) observed, that although the question had been argued at considerable length, the points appeared to lie in a narrow compass.

Monday,
November 28.

The bequest, in this case, to the testator's natural children, is a general bequest of all his real and personal property, as well in *India* as elsewhere. The facts are concisely, that General *Duff*, one of the executors, and who had proved the will in *India*, had possessed himself of part of the personal estate in his life-time, and brought it into this country, which on his death was received by his executors. He died before the distribution of the residue under the directions of the will. All those sums so received by *Duff*'s executors, after his death, have since come to the hands of the defendant, who has proved the will in the Prerogative Court of *Canterbury*, and assumed the character and duty of an executor of the will of Mr. *Robertson*; and all the personal property which he had then received from the executors of General *Duff*, as well as what he has subsequently received, must be considered as the personal estate of Mr. *Robertson*, in the hands of the defendant as his executor, to be disposed of and administered according to the will. The legatees are all resident here. The trusts of the will are, that after making a provision for their mother, the property shall be transferred to them in equal shares, on their attaining the age of twenty-one. The period of their having attained that age has not yet arrived, and consequently the executor

executor (this defendant) in the mean time having the money in his hands and in his possession; it must be taken to be clearly assets to all intents and purposes, and liable to the satisfaction of debts. There are, however, no debts; and this is stated to be the clear residue of Mr. *Robertson's* estate.

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It seems to us to make no difference, in this case, that great part of the property had been received by General *Duff*, or that he had proved the will in *India*, as it ultimately comes through General *Duff's* executors to the hands of Sir *Charles Cockerell*.

Nor does it appear to be sufficiently matter of consideration, to inquire where some of these parties died, or where others of them lived, for we think the result would not in any manner affect this case, as in all events the duty clearly attaches upon the payment of the legacies.

The defendant having retained the legacies for the benefit of the legatees, is liable to be called on for the payment of the duties.

There is a mode by which Sir *Charles Cockerell* might have protected himself from this information, by paying the money into this Court for that purpose, as by a clause in the act he was entitled to do, and thus have discharged himself of the penalties; that however he has not done; and he has conse-

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quently rendered himself liable to an information. We are of opinion, that he is indebted to the King in the sum stated in this information, and must therefore confirm the

Judgment for the Crown.

Friday,
November 15.

The ATTORNEY GENERAL v. CHARLES SAGGERS
and his Wife.

Saturday,
June 25.

The statute of 8th Anne, imposing a penalty of treble the value, on the importation of foreign goods prohibited to be imported into this country, is prospective in construction and operation, and extends to all such goods as have been or may be prohibited subsequently to that statute.

A count founded on that statute not inconsistent with a count on the 6th Geo. 3, although evidence of a single act might be sufficient to support both counts.

Omission of the name of defendant's wife is no ground for moving in arrest of judgment, except as to her only, and is not an objection fatal to the information.

" harbouring,

" harbouring, keeping and concealing such goods,
" knowing them to be prohibited and run goods."

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The third count was for the further penalty of 200*l.* given by the 6th *Geo.* 3d. chap. 19, sect. 1, " for concealing 270 dozen pairs of foreign manufactured leather gloves, with intent to prevent " the forfeiture or seizure of the same."

On the trial, at the Sittings after last Easter Term, a verdict was taken for the Crown on the first and third counts.

In Trinity term following, the Common Serjeant obtained a rule *nisi* for setting aside that verdict, and causing it to be entered on either the third or first count only, and not on both counts, on the objection as to the first count, that the goods which were the subject of the present information, had not been prohibited to be imported into this country previous to or at the time of passing the statute of the 8th of *Anne*,—a statute which could not be construed to have had a prospective view to all such goods as should then in future be prohibited; and that it was therefore not applicable to the act imputed to these defendants. And as to the third count, that if the statute of *Anne* should be considered as operating to affect subsequent prohibitions, yet that the having such prohibited goods in possession, and concealing them, was one entire offence, and not penal under both the statute of *Anne*, and that of the 6th of *Geo.* 3. at one and the same moment; and consequently, therefore only

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only subject to one penalty, under one statute. It also had been moved, that at all events the judgment should be arrested, on account of the informality of the omission of the wife's name.

The *Solicitor General*, followed by *Dauncey*, *Clarke*, and *Walton*, now shewed cause, insisting that the statute of *Anne* was prospective; and that the act of possession, and the act of concealment, though of the same goods, were distinct integral offences.

They affirmed that foreign gloves were prohibited to be imported into this country previous to the statute of *Anne*, as early as the reign of *Edward* the 4th, and are enumerated among other prohibited articles in an act of the 3d of that reign; and subsequently by the 1st *Rich.* 3d. chap. 12. They are also enumerated in the schedule of rates in 12 *Ch.* 2d. ch. 4, and prohibited but on condition of certain duties, *viz.* 2*l.* 10*s.* the gross. But admitting gloves to be an article importable on payment of certain duties, at the time of passing the statute of *Anne*; yet that being a general law for the protection of trade, preventing the importation of all prohibited articles into this country, (as the preamble to the 17th section imports,) it must be considered as extending to all subsequent prohibitions, whereby importation is made an offence. By the general rule of construing acts of parliament, if one statute makes the importation of prohibited goods penal, a subsequent statute prohibiting goods to be imported subjects the importer

to the penalty of the preceding statute: Otherwise such subsequent statutes would be partly nugatory. The 8th of *Anne* also mentions uncustomed goods; and all that the Court have to inquire of, to find whether the penalties attach, is, whether the goods are subject to duty, or whether their importation be prohibited, without regard to the time of imposing the duty, or enacting the prohibition; otherwise they would be restraining the operation of a general and beneficial law.

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Then if the Crown be entitled to a verdict on the first count, the next object of inquiry is, whether it is also entitled to a verdict on the third, in conjunction with that.

Under the first count, it is only necessary to shew that the prohibited goods came knowingly to the hands of the defendants. The third count is, on the 6th of *Geo. 3*, which carries the offence further, and constitutes three different classes of persons, who shall be deemed offenders under the act, and liable to the penalty of 200*l.* The first is, of those who shall bring any such leather gloves into the kingdom: The second, of persons being retailers or venders of any sort of gloves, who shall be found having prohibited gloves in their possession, or exposing them to sale: The third class is of those who shall conceal such gloves, with intent to prevent the forfeiture or seizure. Now this last is an offence not noticed by the statute of *Anne*; nor could the Crown under that statute charge the defendants with the treble value for this offence; but

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but it comes completely within this statute, and is liable to the penalty of 200*l.* The defendant is here first charged as a subject with a general breach of the laws of commerce; and next with the particular offence of being a vendor of, or concealing contraband goods to prevent the seizure.

Double the value of the gloves seized might amount in some trifling instances to a very small penalty indeed; and on the other hand, a forfeiture of 200*l.* might often be also too inadequate a penalty to prevent persons largely dealing with prohibited goods. In this Court the same transaction is constantly the subject of different penalties, as in the case of removing beer, and putting it into casks, without a previous notice, which creates one offence; and the party is also liable to penalties for each of the tubs not entered.

They conceded to the objection as to the omission of the wife's christian name, but only as far as the information went to affect her.

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15th November.

The *Common Serjeant*, and *Lawes*, on the part of the defendants, contended that the 6th of *Geo. the 3d*, on which the last count was framed, was the only statute on which the information could proceed. The more ancient statutes adverted to, all relate to goods imported for sale, and respected the rising commerce in the early ages: but gloves were, by 12 *Ch. 2*, permitted to be imported on certain terms, and were therefore not prohibited at the time

time of the 8th of *Anne*. From that time to the 6th *GEO. 3*, there is no special prohibition to import gloves. By the 4th and 5th *W. & M.* a duty of *25l. per cent.* is imposed on all French goods and merchandise imported into this country, except wine, brandy, salt and vinegar; and by 7th and 8th of *Wm.* on all goods of French manufacture *25l. per cent.* for a term of twenty-one years, from 1696, extending beyond the reign of *Anne*. They were therefore, at that time, recognized as importable into this country, and have remained subject to a duty long subsequent to the 8th of *Anne*. The statute of that year of her reign could never have been intended, and ought not now to be construed, to embrace all goods prohibited to be imported subsequent to that time. The general part of the 17th clause of that act refers expressly to prohibited goods, and not to goods to be prohibited. If it had been in the contemplation of the Legislature when the 6th *GEO. 3d* was passed, that the statute of *Anne* would also apply, and that treble value alone would have been inadequate, the penalty of *200l.* imposed by that statute would have been expressed to be over and above the penalties of the 8th of *Anne*. The 5th of *GEO. the 3d*, ch. 48, imposing a penalty of *200l.* on the importers of foreign silk gloves, being venders, expressly says, it shall be over and above the forfeiture and loss of such silk stockings, silk mitts, silk gloves, &c. and that may throw some light on the construction of these statutes.

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The preamble to the 6th of *GEO. the 3d*, recites that

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that large quantities of foreign manufactured leather gloves are clandestinely brought into this kingdom, whereby the revenue is defrauded, (obviously recognizing the book of rates,) and those employed in the manufacture of gloves deprived of the means of providing for themselves and families; and then enacts that all such gloves brought into this country shall be forfeited and seized as other prohibited and uncustomed goods; and that any person so importing such gloves, or being a vender or retailer of any kind of leather gloves, in whose custody or possession any such foreign manufactured leather gloves or mitts shall be found, or who shall sell, or expose to sale, any such leather gloves or mitts, "or " who shall conceal any such leather gloves or " mitts, with intent to prevent the forfeiture or " seizure of the same, shall, over and above the " forfeiture and loss of such leather gloves and " mitts,"—not over and above the penalties of any other acts,—"and all interest which he, she " or they may have therein, for every such offence " forfeit and pay the sum of 200*l.* together with " double costs of suit." That act was made to prohibit the importation of French leather gloves, and French leather gloves only. It is the sole act relating to such prohibition; it stands singly, and does not come within the purview of any other act, nor has it any incorporating clause.

[THOMSON, *Chief Baron.* In what does that act differ from the act respecting silk gloves?]

In giving double costs.

[THOMSON,

[THOMSON, *Chief Baron.* The offences being the same in both.]

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[*Dauncey.* And the statute of *Anne* has been constantly applied to that.]

But this statute enumerates not only all the circumstances under which an offender can be liable to penalties, but all the penalties to which he is rendered amenable.

It has been said that one transaction might be a breach of two statutory enactments, and incur two several penalties; and the instance was put of removing beer without notice, and putting it into unentered tubs; but it does not necessarily follow that the beer so removed should be put into unentered tubs. And these offences against the brewing act are capable of being committed by two distinct persons at different times; the acts here are identified in one and the same person, at one and the same time; not two acts, but the same act placed in different views. It is an offence originating with the statute of the 6th Geo. 3, and then first incurring any penalty; but incurring at the same time a heavy and a certain one; new prohibitions have always new penalties; and where there is no penalty, an indictment is the proper course.

[GRAHAM, *Baron.* If a statute prohibit contraband goods under a penalty, a subsequent statute declaring goods contraband, will draw the penalty after it.]

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When the Legislature gives an adequate penalty, there is no necessity of recurring to former acts ; or, if necessary, it should be done by the subsequent statute in terms. It is contrary to the principle of legislation, that previous statutes should operate on subsequent acts ; or if that were not so, the statute of *Anne* would here repeal the statute of 6 Geo. 3. Certainly, if a former act give a penalty of 500*l.* it would be repealed by a subsequent statute, imposing on the same offence a penalty of 200*l.* These are penal, not remedial laws, and subsequent enactments should be construed so as to mitigate rather than to accumulate previous penalties. The statute of *Anne* was, perhaps, general at the time of its being passed into a law ; but it cannot operate generally now. A general count on it would be bad in substance, and judgment might be arrested on that objection ; for it is not every custody of prohibited articles *per se* that constitutes an offence under that act. On the whole, it is submitted that there is only one penalty attaching on this possession of prohibited goods, and that that is the penalty of 200*l.* in the third count of the information under the 6th of Geo. 3.

Dauncey, in reply. This objection is now, for the first time, made to a statute which has been acted on for more than a century, as the subject and general ground-work of every information laid for the offence created by ; it and usage is held to interpret statutes. Distinct penalties are sought for here, because the offences are distinct, and are declared to be so by different acts.

[GRAHAM,

[*GRAHAM, Baron.* The same evidence would support both charges; a concealing is a possession.]

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Their argument is, that unless he conceals, he is liable to no penalty for the possession, not being a vendor or retailer; because the goods are only prohibited *sub modo*. It is said, that these goods were not prohibited before the 6th Geo. 3;—that we deny; or if they were not, we contend that the statute of *Anne* attaches as soon as goods are prohibited by any subsequent act of the Legislature. That statute has no restrictive words:—And would not a law, prohibiting the importation of goods, made on the day after passing that act, have been affected by it? and if it would, so would a law made at this day. If this be in one sense a penal statute, it is also, in another view, a remedial law, advantageous to the commerce of the country and the revenue of the state. One act is frequently the subject of two penalties, as in the common case of maltasters, in what is called running a wetting;—that is, moving forward the malt in its progress from the cistern to the kiln; every removal there is a distinct offence.

[*Chief Baron.* They proceed for two penalties in the case of importing foreign brandy: One for not paying the duties, and another for importing it in small casks.]

So here the acts are distinct offences; and if the statutes are not taken together, the penalties may become nugatory and inefficient.

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Monday,
28th November.

THOMSON, *Chief Baron*, delivering the judgment of the Court, set out the information, and selected such leading points of the case as bore materially on the question; which he stated to be,— Whether the defendant had, under the circumstances, committed one or more offences against the revenue-laws;—or, if he had committed one only, then, Whether that was to be considered an infringement of the provisions of the statute of the 8th of *Anne*, or of that of the 6th of *Geo. 3.*

The statute of the 8th of *Anne*, ch. 7, (the 17th section of which is that which it is at present alone material to consider for the purposes of this inquiry) was an act for preventing the frauds which might be practised in unshipping, to be landed, generally, any sort of goods whatsoever, subject to duty, without paying that duty; and also generally to hinder the importation of any sort of prohibited goods into *Great Britain*.—And it is therefore enacted, that if any such goods as shall be liable to duty, shall be unshipped with intention to be laid on land, (customs and other duties not being first paid or secured,) or, if any prohibited goods whatsoever shall be imported into any part of *Great Britain*, then not only the said uncustomed and prohibited goods shall be forfeited and lost; but also the persons who shall be assisting, or otherwise concerned in the unshipping the said prohibited and uncustomed goods, or to whose hands the same shall knowingly come, after the unshipping thereof, shall forfeit treble the value.

Under

Under that clause it is, that the first penalty is sought by this information; the defendant being charged by the first count with having in his possession certain prohibited and uncustomed articles; that is to say, foreign leather gloves, knowing that they were prohibited to be imported.

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On the part of the defendant, it is now contended, that this statute is to be confined to the possession of such goods only as were prohibited to be imported at the time when it passed:—that it does not extend to render penal the possession of goods prohibited by any subsequent act:—and it is affirmed, that foreign gloves were not prohibited goods at the time of passing the act of the 8th of *Anne*, or at any subsequent period till the 6th of *Geo. 3.*

Certainly, there were some ancient statutes brought forward by the Solicitor General, wherein the importation of foreign gloves was prohibited, but they were repealed in effect, though not in terms, by subsequent statutes; and particularly by the 12th of *Ch. 2 ch. 4*, by which the importation of foreign gloves was permitted, as appears at least by the imposition of certain duties on them, whereby the preceding acts which prohibited them were virtually repealed.

It was not, however, admitted by the Crown, that the repeal of those statutes was a necessary consequence of the subsequent impost, laid on the importation of previously prohibited goods; and

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the Solicitor General mentioned the case of an act of *Ch.* the 2nd, having prohibited the importation of hogs and bacon from *Ireland*; and that though a subsequent act of *Wm.* the 3rd, imposed a duty on bacon so imported, it was thought necessary that a third act should, notwithstanding, be passed, to declare that the act of *Ch.* the 2nd. should not be enforced; whereby it should seem that a statute, laying duties on prohibited goods, did not thereby repeal the original prohibition; but the Solicitor General did not insist on that point.

Suppose, therefore, that at the time of the statute of *Anne* these goods were not prohibited: then the question arises, whether that statute applies to goods, subsequently prohibited by other acts: and we are of opinion, that that statute is not so confined in its operation, but that whenever a subsequent act prohibits the importation of goods, the provisions of the 8th of *Anne* immediately attach, as much as if they had been prohibited at the time of making that statute.

That these goods are prohibited by the 6th of *Geo.* the 3d, is perfectly clear; and if, being imported, they come to the hands of a vender or retailer of gloves, the penalty under that statute is incurred. So also if any person harbour or conceal such goods to prevent forfeiture or seizure, he would likewise become liable to the penalty for that offence. The statute of *Anne* attaches on persons having possession of goods, knowing them to be prohibited to be imported; and it seems to us that the two statutes ~~may~~ well

well stand together:—The one requires merely a possession of the goods, with a knowledge of their prohibition:—The other, a possession with intent to conceal from forfeiture or seizure. The first offence differs materially from the second, and neither is so blended with the other, that a penalty being recovered on one should preclude the Crown from proceeding for the penalty attaching on the other also.

We are therefore of opinion, that on this information the act of the defendant supports as well the count for the recovery of treble the value of the prohibited goods, as also the count for the specific penalty of 200*l.* and that the verdict for the Crown should stand as recorded.

Judgment for the Crown.

THOMAS v. THE ROYAL EXCHANGE ASSURANCE.

Saturday,
November 19.

THE plaintiff had insured his ship and cargo with the defendants, on her voyage from *Helstone* to *Cork*, with liberty to touch and stay at any port or place, without prejudice to the insurance. The vessel took fire at sea and was burnt, and the cargo lost.

provisions, (although he also transmits a letter at the same time) it is not a question to which the Jury are competent.

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The present action was brought on the policy against the insurers, and tried at the last assizes for the county of *Cornwall*, before Mr. Justice *Dampier*.—It was in evidence, that the vessel sailed on the 13th of *September*, at eight o'clock *a. m.* with the wind about north-west. When she had got between *Helford* and *Coverack Cove*, the wind began to blow strong from the westward, and the *Manacles* before them. On heaving the vessel in stays she shot a-head farther than was expected, and touched aground on the sand, but got off without injury. They then hailed a *fish*ing-boat, in which the captain sent a man ashore to *Coverack*, for a barrel of fish, and to make inquiry as to any one having been there from *Helstone*, who returned with the fish in about half an hour. The next day, the vessel not having made, or being able to make, any progress, the wind being a-head, and a flood-tide, and there being privateers cruising off the coast, they put into *Guavas Lake*, in *Mount's Bay*, where they lay-to at single anchor for the night; from thence *Hervey*, the supercargo, wrote a letter to the plaintiff, which he sent ashore at *Penzance*, by one of the crew. The next day the same man went ashore again for an answer from the plaintiff. He saw the plaintiff at *Penzance*, and they came and hailed the supercargo and captain to come on shore, which they did, and they all transacted business together. They afterwards went on board, and weighed anchor and put to sea about six o'clock *p. m.* and in about an hour afterwards the vessel was discovered to be on fire.—She was ultimately consumed, and the cargo totally lost.

The

The principal point of the defence set up was a deviation; and to support that defence their witnesses said, the wind was fair on their leaving *Helstone*, and that though there was afterwards a head wind, by beating to windward, they might have proceeded to *Cork*.

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On this evidence the Judge left it to the Jury, observing, that to vacate the insurance, the delay at *Coverack Cove*, and afterwards at *Mounts Bay*, must be considered as having increased the risk; but if they went in for provision it was justified, and was therefore not a deviation.

The Jury found a verdict for the Plaintiff.

Lens, Serjeant, having obtained a rule *nisi* for a new trial, on the objection of a mis-direction on the part of the Judge:

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Pell, Barrough, and Gifford, now shewed cause. The question of deviation was fairly left to the Jury after a minute investigation. It was in proof, that when they put into *Coverack Cove* the wind was strong and adverse; and that privateers were cruising in the Channel. It was therefore safer to do so. Stopping to send in a letter, without dropping anchor, and the sails set, and the boat bringing back a barrel of pilchards, cannot be said to be such a deviation as shall discharge the underwriters. One of the defendant's witnesses said, that he could have proceeded to *Cork* with his vessel; but he was the commander of a revenue cutter; and what he might

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have done with his vessel should not affect this case :—The question is not, whether the captain might have done better, but, whether he has done ill. In *Urquhart v. Barnard*, (a) it is said by Lord Chief Justice *Mansfield*, that it is nowhere defined what is the meaning of the words “liberty to touch,” as contra-distinguished from “to touch and stay;” and he adverts to the expression of Lord *Mansfield*, that “touch and stay,” means in case of necessity, which, he says, cannot be; as in such case the clause would be nugatory; and an act of necessity such as to obtain provisions in case of extremity, could not be construed deviation:—this policy has that permission; and we should always keep in mind the contract of indemnity between the parties. But the whole was left to the Jury; and they have found to the satisfaction of the Judge.

Lens & Gaselee, contra.—The case, which is a mixed question of law and fact, has not gone properly to the Jury. The fact of going out of the course of the voyage, unless it can be justified, vacates the policy, (b) although the risk be not increased or altered by it. The increase of risk is not the criterion of deviation. *Leocabre v. Wilson*, (c). Wherever there has been a deviation, it must be justified to save the policy. There were two departures here, neither of which could be justified:—There could have been no necessity to go in for provisions, on a voyage of forty-eight hours; that was a direct deviation:—As little can

(a) 1 *Taunt.* 455. (b) 2 *Parke*, 287. (c) 1 *Douglas*, 290.

the

the sending a letter be justified, which was an act calculated for delay alone; liberty to touch and stay must be confined to the voyage, otherwise there can be no deviation in any case. In *Scots v. Warwick* (d), a case of the other day only, of an action on a policy from *Plymouth* to *Gibraltar*, Lord *Ellenborough* held, that the captain going in for pressed men, had no right to do so, having already more than he wanted; and he ought to have been ready to sail immediately:—Instead of the attention of the Jury being directed to the question of deviation, or no deviation, they were desired to regard the consequences; which was improper.

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THOMSON, *Chief Baron*, absent.

GRAHAM, *Baron*. If the fact of deviation had been established, they should have shewn just cause, otherwise the deviation vacates the policy, without proving risk. My mind intimates, that the Jury might be perplexed with considerations not belonging to the cause, and therefore it would be dangerous to have left the question of deviation wholly to them; and they were in all respects properly directed. The question was, Whether the deviation was justified? and the Jury looked to the justifying circumstances. I agree with Mr. Justice *Dampier*, that if a man acts fairly, and to the best of his skill, although not a most expert seaman, it is all that is required.

(d) Not yet reported.

It

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It appears there was a head wind, and danger; and he touches for a time in *Mounts Bay*; and it was a question for the Jury to decide on; nor do I think they have done wrong. I therefore see no distinct ground for sending it down again.

WOOD, Baron. I am of the same opinion.—I agree that there should be a reasonable cause to justify a deviation; but going in for provisions is a justifiable cause; and the Jury were to decide whether it was a *bond fide* going in for that purpose.—Perhaps the master of a different vessel might have got quicker round. I take it for granted that *Mounts Bay* is in the course of the voyage, and if so, sending a letter would be no deviation. I think there has been no misdirection; and that the verdict is not contrary to the weight of the evidence.

RICHARDS, Baron. The Jury have decided on the evidence; and I think it supports the verdict. A witness says, the object of going in was to get the cask of fish; it may seem extraordinary, but the Jury believe it.—He then says, they went round the *Lizard* next day, when there was a head-wind along shore. He says, the bay is in the way to *Cork*. *Thomas Hervey* says, the wind was foul, and when it became fair we sailed; and the Jury on the evidence have found there was no loitering which could create an objection to this action. I think the Judge's direction on the point right. There was evidence on the other side to shew unnecessary delay, but it did not satisfy the Jury.

I therefore entirely concur in the opinions which 1814.
have been given.

Rule discharged.

BEAZLEY v. SHAPEIGH.

Same Day.

LENS & Gifford shewed cause against a rule nisi obtained by *Harris*, on the behalf of the defendant, for a new trial, on affidavits by defendant's attorney, and another person, stating, that the cause stood No. 17 in the paper—that No. 14 was a question of right of way, and expected to occupy considerable part of the day—that the solicitor having new matter to add to his briefs, was at home, making the necessary additions, when the cause was called on, as it had been in his absence in consequence of having been taken out of course; No. 14 being postponed till next day; and that a verdict of damages was found for the plaintiff.

In case of a verdict taken in the absence of a party and his solicitor, the Court will, in some instances, order a new trial, if reasonable cause be shewn.

The action was case on a warranty of an unsound horse.

Under the peculiar circumstances, the Court made the

Rule absolute.

THE

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Monday,
28th Nov.

Bond to the Crown, though not forfeited, is sufficient to entitle the obligor to an extent in aid.

The rule of Court not indispensable, that the affidavit should contain an allegation that the debt is not a trust debt.

THE KING v. MAINWARING.

JOHN Lyall, a contractor for supplying the commissariat, obtained a baron's fiat for an extent in aid, on an affidavit setting forth his bond to the Crown, now outstanding and undischarged, conditioned as therein mentioned:—a debt due to him from the defendant and his partners:—and a docket struck against them, endangering the loss of his said debt, whereby the deponent will be “less able “ to satisfy what he may be indebted to his Majesty “ on the said bond.”

Martin moved, on behalf of the defendants and their provisional assignee, that, the proceedings under the extent should be set aside, & *amoneantur manus*, and the money restored. He urged that the affidavit did not contain that part of the allegation required by a rule of the Court (e) to be made, that the debt on which the extent was founded was not a trust debt—that it was not stated to be an actual and existing, but a probable and contingent, debt, which the deponent might never owe; and therefore insufficient to defeat a commission of bankrupt, and secure to an individual creditor twenty shillings in the pound out of the bankrupt's estate; and the condition of the bond is carefully suppressed.

(e) Hughes' Report, p. 205.

Per

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Per Curiam. It is not necessary to state the condition or forfeiture of the bond ; it is sufficient to produce it merely. Being a debt on record it binds immediately. The usage of the Court has always permitted an extent to issue under such circumstances, in the case of an immediate debtor to the Crown.

Motion refused.

EDWARDS v. JOHNSON & HOGARTH.

Same Day.

LOVAT moved to discharge the order for an injunction to restrain defendant from proceeding at law, which had been obtained in this cause under these circumstances :—The plaintiff had excepted to the defendant's answer, and had given a four-day rule for arguing the exceptions. In the mean time the defendant tendered a further answer to the officer of the court, who refused to file it till the exceptions should be disposed of. The plaintiff treated that offer of further answer as a submission to the exceptions, and moved on that ground for an injunction as a matter of course, and an order was drawn up accordingly, which was now sought to be discharged. Defendant insisted that he had a right to put in a further answer before the argument of the exceptions, which would itself dispose of them. The proceeding, he submitted, was founded in reason and good sense, and was consistent with the practice of the Court of Chancery ; and

Pending exceptions to an answer, a further answer, cannot be filed in this court until those exceptions are argued and disposed of.

Such tender of further answer is a submission to the exceptions, and the injunction may be moved for after such an offer as of course.

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v.
JOHNSON & HOGARTH. and he cited the cases of *Knox v. Symonds* (*f*), *Partridge v. Haycraft* (*g*), *Mayne v. Hochin* (*h*), and *Bothan v. Bateman* (*i*), and doubted that any case could be furnished where the Court of Exchequer had adopted a contrary practice. The ground of excepting is, that we have not furnished them with a full discovery by our answer,—we answer more fully, and they obtain an injunction because we do so.

RICHARDS, Baron. My practice in this court furnishes me with the experience of thirty years; and though the rule is certainly otherwise in the Court of Chancery, yet here the further answer cannot be received till the exceptions are disposed of.

Per Curiam. You cannot answer further till you have got rid of these exceptions, according to the practice of this Court.

Motion disallowed.

(*f*) 1 Ves. 87.

(*h*) 11 Ves. 578.

(*g*) Dickens, 255.

(*i*) Ibid. 296.

END OF MICHAELMAS TERM.

SITTINGS AFTER MICHAELMAS TERM.

55 GEORGE III.

SERJEANTS INN HALL.

The KING v. JONES.

1814

Saturday,
17th December.

A WRIT of *venditioni exponas* having been issued in Trinity Term last, to sell goods seized under a writ of *extent*, which had been appraised by inquisition at 1,800*l.*; the sheriff now returned the writ; and that he had sold the goods for 2,000*l.*; that out of that sum he had retained 500*l.* for his extra expenses; and that he had deducted his usual poundage.

The sheriff selling under a *vend. exp.* is not entitled to deduct any thing, either for extra expenses or poundage, or to return such a deduction.

Dauncey now moved, that the sheriff might pay the balance to the Receiver General, on account of the debt due to the Crown; but the Court refused to allow the deductions in the return for extra trouble.

He must make a return of the whole sum produced by the sale, when the Court order it to be paid over, deducting poundage; and he must move the Court for any extra allowance to which he may be entitled.

Per Curiam.—If any thing is due to the sheriff on such account, it should be ascertained by reference to the master on his own application. The sheriff has no right to make any other return to the *venditioni exponas* than the sum for which the goods were sold. The common and proper return to be made

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made by the sheriff is the amount of the money in his hands, on which the Court order him to pay it over, deducting poundage; and if he has any further claim, he must come with an application for its allowance.

Motion refused.

Some day.

In the matter of *John Kingsman* and *John Hird*, officers in the service of his Majesty's customs.

The Ex-
chequer will
remove into
its own Court
proceedings
commenced
against a
revenue offi-
cer in the
Courts of
Great Sessions
in Wales, for
acts done in
execution of
his duty.

Dauncey moved on the part of the officers, that the writ of *clausum fregit*, which had been issued against them by *Hugh Thomas*, in the Court of Great Sessions for the county of *Anglesey*, might be removed into this Court, and that all proceedings therein in the Court below might in the mean time be stayed.

This motion was founded on an affidavit of the officers, on whose behalf it was made, and *Evan Evans* stating, that having received a *capias* to arrest a person under an information against him in this Court, for concealing uncustomed goods, they saw him enter the dwelling house of the said *Hugh Thomas*, and followed him in, but that they committed no act of violence while there:—That soon afterwards they (the officers) were served with the said process, as they believed on that account.

Per Curiam,

Motion ordered.

THE

The KING v. COOMBES.

Same day.

THE real estates of the defendant, which were subject to certain mortgages, had been seized under an extent on an inquisition; and by an order of the Court of the 10th of *May*, 1813, a sale of all his estate, right, title and interest in the property, was directed subject to the mortgages, and the equity of redemption therefore, only should have been sold; but the sheriff proceeded to sell them absolutely, without reference to the interest of the mortgagees, and the money arising from the sale was paid into Court.

Dauncey applied to be allowed to pay off the mortgages out of the purchase money, and apply the residue in satisfaction of the debt to the Crown, as far as it would go.

Thomson, Chief Baron. That cannot be done in this manner. All that was to have been sold was the Equity of Redemption, and they have sold the whole. In strictness, no order of sale of the Crown debtor's estate, subject to a mortgage, should be made without notice of the motion for such an order first given to the mortgagees.

There have been many orders, referring it to the Deputy Remembrancer, to see what was due on the mortgage, and that is the correct course to be pursued; for the defendant is entitled to have the

If an estate, subject to a mortgage, be sold absolutely under an extent, and the purchase money paid into Court, the Crown will not be allowed, on a motion, to satisfy the mortgagees, but the Court will order a reference to the Deputy Remembrancer, to ascertain what is due on the mortgage.

Notice of motion for an order of sale of Crown debtors mortgaged lands, under an extent, should be given to the mortgagees before the motion can be made.

1814.

account taken regularly, and not 100*l.* or as many pence allowed against him.

Dauncey. The Crown Solicitor wishes to avoid the expense, and at once to pay over the principal, interest, and costs, which he says is ascertained between him and the mortgagee.

Per Curiam.—Without the defendant's consent, the Court cannot do more than make the order of reference before pointed out as the proper proceeding.

Motion refused.

[It was subsequently ordered, that, on reading the extent, and order of the 18th. of *May*, and the Deputy Remembrancer's certificate of the cash in Court, and hearing counsel for the mortgagee and purchaser, it should be referred to the Deputy Remembrancer to take an account of what was due on the mortgage.]

19th December.

The DUKE OF BEDFORD v. MACNAMARA.

On a bill filed to stay proceedings (in an action brought by defendant for dilapidations founded on the destruction of the buildings thereon) and for a discovery whether he has not, since the commencement of the suit at law, assigned his interest in the premises; the defendant cannot protect himself from the discovery, or discharge himself from answering by a plea, that the building had been destroyed by fire, at a time when defendant was entitled, and had ever since continued out of repair and waste.

THE plaintiff in equity had pleaded to an action at law, at the suit of the defendant, for dilapidations; but it having subsequently come to his knowledge, founded on the destruction of the buildings thereon) and for a discovery whether he has not, since the commencement of the suit at law, assigned his interest in the premises; the defendant cannot protect himself from the discovery, or discharge himself from answering by a plea, that the building had been destroyed by fire, at a time when defendant was entitled, and had ever since continued out of repair and waste.

ledge,

ledges, that the defendant had conveyed his interest in the premises to trustees on certain trusts, he filed the present bill for a discovery; and that the defendant might in the mean time be restrained from proceeding further in the action at law.

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v.
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It was stated by the bill, that in the year 1773, *Arthur Jones* demised the premises to the then *Duchess of Bedford*, and *Robert Palmer*, for 71 years, the lessees covenanting to repair. *Jones*, by his will, devised the demised premises to his daughter *Mary* (the defendant's wife) for life, with remainders over, subject to a proviso, that if she should marry any man not seised of a freehold estate of inheritance of 1,000*l.* a year, the said premises so devised should vest in certain persons and their heirs; in trust, to permit her to receive the rents and profits to her sole use, and that the same should be subject to her disposal by will. The testator died in 1780. His daughter *Mary* then entered, and received the rents and profits. She afterwards intermarried with the defendant in equity, who was not at that time seised of a freehold estate of inheritance, of the value of 1,000*l.* a year, whereon the trustees became seised of the reversion of the demised premises in fee simple. The bill then proceeded to state, that the *Duchess of Bedford*, and *Palmer* were long since dead; and that the said demised premises had become vested in the plaintiff for the residue of the term, subject to the rents and covenants of the lease; and that in Easter Term last the defendant had brought an action in the King's Bench, in his own name, against the plaintiff,

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plaintiff, for special damages for breach of covenant, to which the plaintiff had pleaded; and that the action was still pending; but that since the putting in of his plea, he had discovered that the defendant and *Mary* his wife, with his son *Arthur*, had by indentures of lease and release, of the 21st and 22d Nov. 1809, appointed the said demised premises to the trustees *Darves*, and *Noble*, to the use of them and their heirs, upon certain trusts now subsisting and unperformed, which the plaintiff was unable to set forth.

It then charged, that the defendant had no right to sue the plaintiff on the covenant after the divestment of the defendant's interest, particularly as the said trustees claimed to be interested in the damages, and threatened or intended to proceed, &c:

To this bill, the defendant pleaded, that on or about the 24th of *February*, 1809, the premises in the said bill mentioned, were burnt down and consumed by fire, and otherwise dilapidated, and that the same have never since been repaired; but that plaintiff did thenceforth permit and suffer, and still continued to permit and suffer the same to be out of repair and waste, whereby a breach of the covenant contained in the indenture of lease in the said bill mentioned, was incurred; in respect whereof the defendant had brought his action at law against the plaintiff, as in the said bill also mentioned; all which matters and things defendant did ever to be true, and that he was ready and willing to prove the same as the Court should award, and therefore he pleaded the

the same to the said bill of complaint, and humbly demanded the judgment of the Court, whether the defendant ought to be compelled to make any further or other answer thereto.

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The defendant had recovered possession of the premises in ejectment.

* *Dauncey and Merrivale*, in support of the plea, described the bill as an attempt to obtain a disclosure of the defendant's family settlement, for the sole purpose of impugning his title. They insisted, that it could answer no other end, for that any discovery which the defendant could make would not serve their case, or defeat the defendant's claim; as, admitting that he had subsequently parted with his interest, he had not by so doing parted with the right of action, which he then had, and still has, on the breach of covenant; and that the title which he had, when that breach was incurred, was sufficient to support his declaration in the present action at law. If so, then the only remaining ground of this bill is, that the plaintiff might be subject to further suits, and to be doubly charged with the same cause of action. But the judgment recovered by the defendant in this suit would be a sufficient plea to any such action, at least for so much as should be recovered under it; or if not, it would then be time enough to come into a court of equity for relief, when the only question would be an apportionment of the damages.

13 December.

Martin & Adam, for the plaintiff, objected to the plea, its total deviation from the acknowledged

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practice, and urged, that the defence by plea is only allowed when any new fact is introduced by it into the case, in bar of the discovery sought, which the bill had suppressed, or where it falsifies any of the allegations of the bill. But here there is no such thing done, unless indeed the fact of Drury Lane Theatre being burnt down be such a new fact. And how does that bear on this question? It seems to be as applicable to any other bill for any other purpose. If the plaintiff had not made out a sufficient case to entitle him to a discovery, or had made it out by misrepresentation, the defendant should have demurred. But the test of this plea may be found in this broad question, Whether a defendant at law,—threatened to be sued also by those who claim title to the legal estate in the premises which are the object of the suit, under an assignment of the plaintiff,—be, or be not entitled, on a bill filed for a discovery of the fact, to have an answer, admitting or denying the existence of any such assignment, such fact being by no means accessible at law?—That is the object of this bill; and it alleges facts, which if true, are sufficient to induce a court of equity to grant such a discovery; and those facts are not denied by this plea. This discovery is necessary to the plaintiff's defence at law, for by it alone can he acquire the means of restraining the damages recoverable by the defendant, within the proper boundaries of his due share in the amount, which must not be more than commensurate with the duration of his title since the period of the breach of covenant. In *Com. Dig. (a) Covenant*

(a) *Tit. Covenant, B. 3.*

is

is said to lie in the assignee after an assignment of the reversion.

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It is only to defeat the defendant's action in part, that this discovery is sought, lest by an action for dilapidations previous to his assignment, he should recover damages for their continuance since that assignment, for which the plaintiff in equity would be answerable also to those entitled under it. To that action a judgment recovered by the former would not be an efficient plea, because there is not a sufficient privity between the two parties. A judgment recovered by the particular tenant could not be used by a wrong-doer in bar of an action brought by the reversioner. If the defendant in this case, who had only a life estate, and not the fee in these premises, were permitted to recover unlimited damages, that is, as much money as would rebuild the premises, it would not exonerate the plaintiff from the further claims of those who are entitled, under him, to their proportion of them. The term too is not yet expired, and the plaintiff may yet repair before the termination of the lease.

Davncey, in reply, insisted that the fact of the total destruction of the premises by fire, at the period of that accident, was such a fact as it had been said not to be:—a new fact, militating with the ground of the plaintiff's bill, connecting the defendant's title with the period of the breach of covenant, and therefore pleadable in bar of the discovery sought. If necessary parties are omitted

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they should have filed a bill of interpleader. As to the argument of rebuilding before the expiration of the lease, the circumstance of the premises having been already recovered by the defendant, by ejectment, disposes of that. In all events, the defendant is entitled to some damages.

[*WOOD, Baron.* You have not averred in your plea, that the defendant brings his action only for damages up to the time of the assignment of his interest.]

He cannot recover beyond the time during which he can show himself to be entitled.

[*WOOD, Baron.* He may recover up to the time of bringing his action.]

When the building was destroyed the defendant was entitled to the premises.

[*WOOD, Baron.* That goes to the *quantum* of the damages only. The assignees have a right to bring their action for the continuance of the dilapidations from the time that they became seized.]

The defendant's main objection to the bill is, that the period of his bringing the action cannot affect his right to damages; and that therefore he is not called on to answer the bill, which, we contend, he has got rid of by the plea on this record.

December 19.

THOMSON, Chief Baron, having recapitulated the material parts of the bill, stated, that the object

object of it was to obtain a discovery of the deed of the 22d of November 1809, whereby it was said, that it would appear that the defendant had parted with his interest in the reversion of the premises demised to the plaintiff's predecessors by the lease of 1773, and by so doing had incapacitated himself to sustain the action at law for damages subsequent to that time.

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The plea upon this Record has certainly answered no part of the bill; but it has stated, in bar of the discovery prayed, that the demised premises had been burnt down and consumed by fire in *February 1809*, and that they have ever since been suffered to lie out of repair and waste, which is averred to be a breach of the covenant in the lease, and therefore, the defendant says, he has brought his action at law.

Now the question for the Court to decide is, whether a sufficient reason has been furnished by this plea for the defendant not having answered the bill.

Certainly the action which has been brought at law would enable the defendant in equity to recover damages up to the time of its commencement, unless the plaintiff could clearly show that the defendant had previously parted with his interest; in which case he would only be entitled to damages up to the period of his having so done, and not for any subsequent breach of the covenant by the plaintiff continuing to permit the premises to lie

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lie out of repair and waste. Whatever right the defendant might have had in the premises before he parted with his interest in the reversion, it is clear that the damages recoverable against the plaintiff, since that time, do not belong to *Macnamara*, his assignees being entitled to damages for the injury sustained by them since the accrual of their right to the reversion. The plaintiff therefore has a right to know how that fact is: and for that purpose he is entitled to see the deeds by which the defendant has transferred his interest. We are of opinion that the bill must be answered, and the plea over-ruled.

Plea over-ruled.

Wednesday,
24 Dec.

BROUGHTON v. DAVIS and THE ATTORNEY
GENERAL.

THE plaintiff had filed his bill against the defendants, praying that he might be repaid two sums of 800*l.* and 500*l.* (advanced by him to the defendant *Davis*, on the security of certain title deeds deposited in the plaintiff's hands) in preference to a debt subsequently due to the Crown, for which an extent had issued against *Davis*, and the depositor is, or may become, a debtor of the Crown, is not available against an extent.

Quare:—Whether such a deposit by the King's debtor good in any case against the Crown?

The

The bill stated, that the plaintiff, who was Receiver General of the Taxes for the parish of St. James, Westminster, having been applied to by the defendant *Davis*, who was collector for the same parish, to advance him money, to enable him to pay into plaintiff's hands a balance of the amount of taxes collected by him for the year 1809; alleging that he was then pressed by the Commissioners to make up his accounts, which he could not do without assistance:—that the plaintiff gave him receipts for those two sums, which he (the plaintiff) afterwards paid into the Exchequer, on the part of *Davis*, out of his own money, in due course, conformably with those receipts:—and that to secure those sums the defendant *Davis* then deposited in the plaintiff's hands the title deeds of certain freehold and leasehold premises, the property of the defendant, of which, by virtue of such deposit, the plaintiff now insisted that he had become the equitable mortgagee:—that *Davis* when he so deposited the deeds was not a debtor to the Crown; and that if legal assignments had been then made of the premises comprised in the said deeds, they would have been good against the Crown:—and that the defendant *Davis* had continued to receive the Rents and profits till the writ of Extent, in aid of the parish, had issued against him.

The answer admitted the material facts stated in the bill.

Horne

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Horne & Richards, for the plaintiff. The doctrine of the validity of an equitable mortgage, by deposit of title deeds, is now too firmly established to need the citation of cases; and if valid between subject and subject, there can be no reason in law, or justice, why they should not be good against the Crown. The only question in the case is, whether *Davis* had deposited the deeds with *Broughton* for a valuable consideration, and that the admission, and evidence put beyond all doubt. There can be no question then between *Broughton* and *Davis*; it is entirely between *Broughton* and the Crown. These two sums have actually been paid by *Broughton* to the Crown, on the part of *Davis*, and in diminution of his debt.

[*GRAHAM, Baron*. It does not appear that *Davis* had received no other money from *Broughton* than these two sums; he was returned in arrear for a much larger sum in the course of the same year of 1809; and how can we say that these two identical sums, which are said to be secured by the deposit, are precisely those which were applied to make up the deficiency of the first quarter only?]

At all events the Crown's debt is reduced by their payment; and *Davis*'s original means are not lessened by allowing *Broughton* to be repaid the money to which he is entitled.

Dauncey, for the *Attorney General* (*Mitford & Price* for the defendant *Davis*) negatived the general

general position, that in cases where a deposit of title deeds to secure the repayment of money would be a valid equitable mortgage between subject and subject, it must also be so considered as against the Crown:— Such a deposit does not always avail against the Crown; and if it did generally, the relative situation of these particular parties would be sufficient to except this case. It was contrary to the duty of the plaintiff's office to accept such a deposit at all from a person in *Davis*'s situation with relation to him, even if he had not been told, as he was, that *Davis* was pressed to make up his accounts. It was then incumbent on him to have given the earliest information to the Commissioners of the state of *Davis*'s responsibility, that the Extent might have issued instantly, by which the parish would have been spared becoming accountable to Government for the further arrear, to be made good by a heavy re-assessment. But in opposition to his duty, and in breach of his trust, he has, by giving a false credit to *Davis*, enabled him to deceive the Commissioners; and the consequence has been this accumulated defalcation. The Commissioners cannot but repose a confidence in their Receiver; and indeed he is bound by the act of Parliament (a) not to betray that confidence, by lending his aid to envelop in secrecy the insolvency of his subordinate officer, which it has directed him, on the first intimation, to declare. When these accounts were tendered, *Broughton* knew there was an arrear of upwards of 4,000*l.*

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(a) 43 Geo. 3, sect. 99.

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In the case of *The King v. Snow* (b), in this Court, an Extent was allowed to prevail against an agreement for the sale of the defendant's estate, though part of the purchase money had been paid, because the conveyance not having been executed the fee still remained in him. And in *The King v. Benson* (c), the defendant's estates were ordered to be sold without regard to the deposit of his title deeds made to Messrs. *Tomkins*.

Horne in reply, disclaimed collusion on the part of the plaintiff; and contended that there could be no well-founded reason precluding a Receiver General from advancing money to a Collector:

(b) EXCISE.—In the EXCHEQUER, about 1804.

THE KING v. SNOW.

In this case the defendant had entered into an agreement for sale of his estate, and had received part of his purchase money; afterwards an extent issued, and it was determined that, as the defendant had not executed any conveyance the fee was in him, and therefore the agreement had no operation against the extent.

(c) EXCISE.—In the EXCHEQUER, about 1809.

THE KING v. BENSON.

The defendant had deposited his title deeds with Messrs. *Tomkins* and *Co.* for securing money advanced by them at the time of such deposit; afterwards this extent issued, and the estate was ordered to be sold without regard to the claim of Messrs. *Tomkins*, who were considered to have had no list against the extent; though they retained the title-deeds. Messrs. *Tomkins* and *Co.* afterwards filed a Bill in Chancery, which they suffered to be dismissed for want of prosecution.

and

and that he had no greater opportunity, of promoting a fraud under sanction of his situation, than any other equitable mortgagee.

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As to the clause in the act of Parliament, it is sufficient to observe, that the Collector settles his accounts with the Commissioners, and not with the Receiver-General; and if the money be paid to Government it can signify nothing by whom it be advanced; but had these sums not been advanced they would still remain due, and unpaid, and would swell the re-assessment to be levied on the parish. It has been paid to Government out of the Receiver's pocket, on behalf of *Davis*, constituting a good consideration for an equitable mortgage, which is, in such case, as effectual as an actual legal mortgage.

The manuscript cases cited are short, and not satisfactorily clear. In the first, the terms or nature of the agreement is not disclosed; nor was it in a court of equity, as appears by the title; and at law the plaintiff has no case, as we admit. In the other case, the bill was dismissed for want of prosecution. At all events this money has been *bond fide* lent by the plaintiff, and on that fact the equity of this case arises against the Crown.

RICHARDS, Baron. If it be admitted that there was no fraud on the part of the plaintiff, and if this should be considered as a common transaction between private individuals, how can such a deposit prevail against third persons without notice? But here it was, at least highly probable, from the very circumstance of the situation of the party, that he might

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might be, or soon become indebted to the Crown, and therefore it was peculiarly incumbent on the mortgagee to have ascertained the fact by inquiry, or he must take the security at his peril.]

THOMSON, *Chief Baron*. It does not seem to me necessary that we should enter into the general question, whether in every case, a deposit of title-deeds, to secure money lent, shall be considered as constituting an equitable lien against the Crown. From some cases, however, it seems that it cannot be so considered.

But be that as it may; when we regard the peculiar circumstances under which this bill has been filed, there is something of a gross complexion in the demeanor of this plaintiff, who comes into a Court of Equity and Revenue to enforce this claim under such circumstances.

In the situation in which he stood, it was his business, and his duty, to spur on the defendant, and insist on his making good his payments; but when the Board call on him for his accounts he appears to have duly accounted for the money which had come to his hands; but that is done by means of the Receiver-General, having furnished him with a voucher for the receipt of money which he has never in fact, paid. A question occurred, whether these sums were included, in point of fact, in the amount debited to the Receiver-General, but let us take it that they did, it was an unjustifiable endeavour to sustain the apparent credit of this sinking

sinking man. The evil consequence of which is, that 1814
 he is enabled to go on as collector to impose himself BROUGHTON
 on the Public as responsible, and he continues to
 involve the parish, who might have been very
 considerably relieved if the Extent had issued when
 he first became unable to pass his accounts. But,
 upheld by the plaintiff, he is encouraged to plunge
 further in debt to the Crown, which but for that
 undue assistance he could not have done.

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What my brother *Richards* threw out is very
 material ; the situation of the defendant rendered
 it very probable that he might be indebted to the
 Crown : it was then the plaintiff's business to have
 ascertained whether he were so indebted, even if
 he had not really known the fact, and on that ground
 alone this deposit, as an equitable mortgage, ought
 to be vacated.

My view of this case is, that the plaintiff can
 not enforce this equitable agreement against the
 Crown, even supposing, that under other circum-
 stances, such an agreement might have been valid ;
 and therefore I think we should dismiss this bill.

Graham, Baron. I am entirely of the same
 opinion, and avoid, as my Lord *Chief Baron* has
 done, the question of general right in other cases
 against the Crown ; and though here it might be
 difficult to ascribe actual fraud, yet the plaintiff
 has certainly not come so fairly before the Court
 as to entitle himself to establish an equitable lien.
 From the character in which he stood, it was his

Q duty

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duty to have given the earliest information of the defendant's circumstances, and have protected the parish from an insolvent collector. He was a trustee for them, and they must ultimately be charged with the deficiency. The plaintiff has thrown a veil over the tottering credit of a man who was two years before in arrear, when the Commissioners might have taken this property, and therefore I think he cannot be entitled to the relief of the Court.

WOOD, *Baron*, expressed himself of the same opinion.

RICHARDS, *Baron*. Such a deposit as has been contended for must in all cases be *bona fide*, but here the defendant must have known, at that time, that a debt was owing to the Crown, and therefore cannot be held entitled to retain the benefit of this equitable mortgage.

Had it been an actual legal mortgage, if *mala fide*, a Court of Equity would have discharged it. I fully concur in all that has been said for dismissing this Bill.

Bill dismissed.

DAUNCEY having applied for costs; Horne objected, on the ground of the deeds having been immediately given up. But,

The Court, as the plaintiff had stood on a point which he could not sustain, awarded

Costs for the Crown.

GRAYS - INN HALL.

The Court this day re-commenced the Sittings
after *Michaelmas* Term, in this Hall, and
it is understood that they will continue to
hold them here in future.

1815.
7th January.

MANBY v. CURTIS.

Tuesday,
10th January.

BILL by the Vicar of the parish church of
Lancaster, for an account of tithe of hay, and all
small tithes.

A receipt,
even of more
than fifty
years old,
offered to be
put in to
prove a mo-
ney payment,
purported by
it to have
been received
in lieu of
tithes, is not
admissible
evidence of
the fact of
such cus-
tomary pay-
ment having
been actedon,
so as to
establish the
defence of a
modus; unless
it can be also
proved who
the parties to
the receipt
were, and in
what cha-
racter they
stood,—and
unless proof
be given of
the hand-
writing, or
death of the
party giving it.
—
Woon, B.
dissentiente.

Defendants, by their answer, alleged (as to
hay in *Bleasdale*) that a modus of 5s. 7d. was
payable to the Improper Rector in lieu of tithe
of corn and hay. In support of the defence they
offered in evidence a paper purporting to be a receipt
for such modus, as far back as the year 1762, which
they would have established by the testimony of
John Gardner, who deposed, "That he was soli-
" citor to the defendants,—that he received the
" receipt about five years ago, from *George Par-*
" *kinson*, formerly a defendant in this suit,—that
" the same purported to be a receipt (dated 23
" November 1762) from *James Smith*, on the be-
" half of *Mrs. Townley*, for the sum of 5s. 7d.
" received of *Thomas Curtas*, for a prescription
" rent, and in lieu of corn tithes and hay in
" *Bleasdale*, due to *Mrs. Townley* at Michaelmas
" then past:—That he believed the receipt and sig-
" nature to be of the hand-writing of the said *James*

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“ *Smith*, and to have been signed on the behalf of
“ the Improper Rector of the said parish of
“ *Lancaster*.”

Dauncey, Martin, & Heys, objected to the receipt being read, that being the defendant's own evidence, put in for himself, it did not come out of the proper custody;—that it could not be permitted to affect third persons;—that there was no evidence of its authenticity; and it might for any thing that was shown be a forgery; and that there should be proof of the money having been actually paid: the hand-writing must be proved, and it does not appear that witness ever saw *Smith* write, or had any means of knowing his hand-writing.

Fonblanque & Wetherell submitted, that the receipt was not offered strictly as a receipt to prove the payment of a sum of money against the plaintiff, to whom it was due, but merely to show that the plaintiff and his predecessors had stood by and submitted to a claim by a third person, adverse to their right. Accounts and loose memoranda have been received in evidence, after a lapse of time, when it would be absurd to call for proof of hand-writing, and this is a transaction of a remote period of time. Such a paper must be considered of equal authenticity with a deed; and had a bond with an indorsement been offered in evidence, it could not have been objected to. As to the custody, it comes out of the hands of *Parkinson*, who was formerly an occupier in the parish, and contributor

tributor to the payment of the modus, and therefore entitled to the custody of the receipt as his discharge for his quota. The paper is supported too by the evidence already given, that the payment has been continued to the present time.

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v
CURTIS.

[*Thomson, Chief Baron.* The question is now on the admissibility of the receipt, and you cannot aid this paper by other evidence.]

The correspondence of subsequent payments is merely offered to show the paper to be genuine; the same rules which apply to a Rector's books, should also apply to a receipt where the evidence of its authenticity is deducible from the propriety of its custody.

If this receipt be not admissible, the paper which was produced and received to prove the recovery of the Quaker's tithes in the year 1714, should not have been admitted; that did not come out of the proper custody, which is that of the Clerk of the Peace; nor did he attest its authenticity, nor the sheriff's officer, nor the magistrate who ordered the levy, yet that paper was admitted to be evidence that the tithes had been paid, and this document ought equally to be received.

Dauncey, in reply, pressed the objections, That it did not appear in proof who any of the parties to the receipt were, or in what character it was given by one, or received by the other;—that there was no proof offered that *Smith* was dead; and that it would be most dangerous to admit such sort of

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evidence so supported. He then referred to a case *memoriter* (which had also been previously adverted to by Mr. *Baron Graham* in the course of the argument) where he said Mr. Justice *Le Blanc* had rejected the same kind of evidence, under similar circumstances at *Nisi Prius*.

THOMSON, *Chief Baron*. It seems to me that in order to decide on the admissibility of this receipt, as it purports to be, we should first consider what is the nature of the evidence, and for what purpose it is produced. Now this paper is produced as matter of evidence, to show that in 1762 a man of the name of *Curtis* did pay to a man of the name of *Smith*, a certain sum of 5*s.* 7*d.* as a modus in lieu of corn and hay tithes for the township of *Bleasdale*; and it appears from the evidence which has been read in support of the authenticity of this paper, that it was delivered to the witness, who was solicitor for the defendant, by the defendant himself. Where that defendant got it does not at all appear; he is indeed stated to be one of the occupiers of lands in *Bleasdale*, for which township the tithe of hay is claimed by the present plaintiff. The holder of the receipt appears to have been an occupier, because he received it in that character, but it seems to be unauthenticated in any way whatever. There is no evidence who Mr. *Smith* was, nor any evidence (which I hold to be extremely material) that that *Smith* is dead; for, though this is fifty years ago, without evidence of his death, it is not to be presumed that this document can be substituted in lieu of the evidence which

which *Smith* himself could give; therefore it seems to me to be essential that you should prove that *Smith* is now dead. I take it to be so in all the cases of vicars books; because, supposing a vicar to be alive who has made entries in his book, his entries are then no evidence; he must be called to prove that he has received the sum stated. There certainly have been cases where former vicars' books have been found in the possession of a succeeding vicar, between the time of *Cha.* the II. and *Geo.* the II. when a man might fairly be supposed to be dead. There is a case in 3d *Gwillim* 847 (a), in which the book of a collector of tithes in 1679 was held to be evidence in 1753, because it was not reasonable to suppose the collector was then alive, and that ground, I conceive, was enough. Without going farther into the question, how far this receipt was authenticated, and whether the money was received for the impropriator, certainly better evidence than this might have been produced; for if this sum was actually received, the person who has given this receipt was the collector, and even supposing him to be dead, they might have produced his account with his principal, and legitimately shown that he had charged himself with the receipt of this sum, and upon that ground it would have been evidence; but, at present, it seems to me that this document is not so supported as to make it evidence of that for which it is produced.

GRAHAM, Baron. I am of opinion, that upon the face of this instrument it cannot be received as evidence. There is something necessary to

(a) *Jones v. Waller.*

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be introduced as subsidiary evidence, and which must be the subject of independent proof; but I have not one single tittle of evidence before me in this cause that seems to me to be satisfactory upon the head of that introductory evidence; the only fact I am aware of is, that this instrument came out of the hands of a person of the name of *Parkinson*, who was formerly a defendant in this cause, and by him it is put into the hands of the attorney in this cause. That is the single fact; then the only question is, what this instrument is? It purports to be a receipt given in the name of *Cortas*, which we are told means *Curtis*; it is stated, that *Parkinson* was one of the contributory persons to this modus, and that it was properly in his hands. Now there is no evidence that *Thomas Parkinson* was ever an occupier in *Bleasdale*; but suppose that difficulty to be got over; this is said to be a receipt to *James Smith*; now what do we know about *James Smith*? It appears to be a receipt for 5*s.* 7*d.* and that *James Smith* has signed this receipt, and I will hardly say it purports to be a receipt of the date of 1762. I think it is impossible, upon looking at it, to suppose that it was so dated*; and the Court ought to be satisfied by evidence that it was a receipt given in 1762; but I will allow even there, that if this receipt was given in 1762, it is extremely doubtful whether this is evidence, supposing it to be so far authenticated. There is, however, no evidence to prove that *Smith* ever was the agent, or whether he is not now living; and, for any thing we know, *James Smith* might have come

* The date appeared somewhat paler than the rest of the writing.

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forward and given his evidence by deposition. I by no means accede to the proposition of its being upon a footing with an ancient deed where possession has been had, and where there is proof undeniable of that possession ; for such receipts might be fabricated daily ; but it is impossible for a Court to ascribe authenticity to instruments of this sort. I am perfectly clear, without referring to particular cases, but on the general principle in all cases of agency, that where the act of the agent is the act to be proved, in order to constitute the proof, the Court will always have reasonable evidence of the agency, and that the person is not living. Where else was the anxiety of Mr. Justice *Le Blanc*? Such inquiries would only perplex the mind with anxious search ; we should be looking for ancient usage, and overlook the broadest principle that was ever laid down. I cannot bring my mind to consider this unsupported document as admissible evidence, and therefore think we should not receive it on the present occasion ; and if my opinion is overset, it will lead me to be extremely modest with regard to my own opinion, after the many years I have sat in a Court of Equity. It certainly is a question of great importance.

WOOD, *Baron*. I am also of opinion that this is a question of the greatest importance ; for if this receipt should be rejected as not evidence, the consequence will be the subversion of all moduses. A person who pays a modus can show no other title than his receipt. A modus is an immemorial payment in lieu of tithes. The whole proof of it must depend upon parol evidence, and upon no better evidence

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evidence can a man preserve his modus, than by showing his ancient receipts, which are his title deeds, for no other can he have to establish his right; therefore in these cases I conceive that receipts stand upon the same principle, and upon the same footing with deeds. I admit that payment must be proved: that is the general rule; but that rule does not apply to real estates or to title deeds. Now it has been rightly said, that if this had been an ancient deed, and upheld by long possession, it would be admissible in evidence.—I will try it by that rule, and see, first, whether there is any actual proof of payment on which this receipt can be bottomed. It has been proved by *Ainsley*, that for many years the modus had been paid. Then it is bottomed in possession. The next question is, What is the age of it? for had it been a modern receipt, I agree it would not be evidence. Twenty years is now held to be sufficient, but this receipt is more than fifty years old; then if it had been a deed would it not have been received in evidence? most certainly it would; and a receipt in this case is also evidence of title. But then it is said, it is not sufficiently authenticated, for want of being shown to have come out of the proper possession. Is it not sufficiently authenticated, if it is proved to come out of the custody and possession of a person who has lands in *Bleasdale*? and it does come out of the hands of a defendant who resided in *Bleasdale*: If it comes out of the custody of any one of the occupiers, it comes out of the proper custody, because all of them could not have it; and when deeds come out of the proper custody do you ever inquire, whether any of the subscribing witnesses are living?

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No; you give credit to the execution of them, whether the witnesses are living or dead:—Now here is a man giving a receipt fifty years ago; is it necessary in such case to prove that he is living? or is it any objection to a deed being read, that the witnesses have not been proved to be dead? It certainly is not so in modern cases; all must be presumed to be *sive et solemniter acta*. Had this receipt been 100 years old, would it be necessary to show who *Smith* was, or who *Mrs. Townley* was? Where an instrument is of so great an age you always give credit to what the thing purports to be, and this purports to be a receipt from one *Curtis*, (and what could he have to do with it, unless he had some connection with *Bleasdale*?) for the sum of 5*s.* 7*d.* (which sum has been proved to have been subsequently paid in lieu of the tithe of corn and hay;) and that is the modus now set up. It is in proof, therefore, that he actually paid such a modus due at Michaelmas then last past, and due to *Mrs. Townley*, who appears, I think, to have been the improper Rector, and it is sanctioned by full authenticity. But then there is another objection, that the date may have been put to it at a different period from the time of payment; whether it is the same ink, or whether the effect has been produced by rubbing, I cannot tell, but the character of the hand-writing exactly tallies. On the whole, I think, there is no doubt at all about its being a genuine receipt, and of the date which it purports to be. Now let us be consistent with ourselves; we admitted the Quaker's paper, and why? Because we conceived it came out of the proper custody, and I conceive this to be of the same nature, it is evidence of title; and I am sure that if ancient receipts

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ceipts cannot be produced in evidence there must be an end of title. Upon these grounds I think this document is a muniment of title, and ought to be received in evidence.

RICHARDS, *Baron*. This question is new, and in many points of view, is a very important one; but, in my judgment, it does not seem to me to be of great consequence in this case. I have no doubt that receipts in many cases are not only admissible, but that they are evidence of a very strong nature. The question here is, whether the receipt now produced is evidence to be received; and let us see how it stands. It was produced by the solicitor of one of the defendants five years ago, he himself being dead, so that in fact it is no more than the production of it by the defendant himself, if he were now a party to the cause. Then it comes to this, whether 5*s.* 7*d.* has in point of fact been paid to the Rector of the parish, in lieu of tithe of hay. The defendant in the cause produces the receipt in question, and I wish to ask, whether, if this had been a bill brought by the Rector, that would have been quite a sufficient answer. Suppose the Rector had said, I am entitled to the tithe of hay and corn and the defendant says, true, you are, but I have paid for hay and corn an annual customary payment, and I produce to you a receipt in the name of *James Smith*; now, would that receipt have bound the Rector, without stating something more; without proving that it was a receipt given by the Rector, or some person authorized by the Rector to give it? Would it be enough to say, I have a receipt—I am the occupier—I am the person who paid—and, I am the person who is now called upon to pay

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pay tithes in kind ; but having paid this sum in the shape of a modus, I give evidence by your receipt for the money that I have paid it as a modus. Now I conceive it impossible to make this receipt evidence against the Rector, without proving that it had been received by the Rector himself, or some other person by his authority ; there is not the least evidence of any such thing ; and it is infinitely more strong as against a third person. I am willing to concede, that a receipt may in some cases be evidence of the title of a person who claims the advantage of a modus, but still it is very different from the case of a deed ; a deed, when executed, is complete and conclusive ; but a receipt is only evidence of a payment, and how can it be produced as against the Vicar. Here he puts in an endowment, and the occupier says, you have not in fact received tithes of hay and corn, but another person has, and I have paid it, *sub modo*, to him. Then the person supposed to have made this payment, or whose co-occupier is supposed to have made this payment, produces this receipt, and asks the Court to conclude the Vicar, because he produces a receipt given by somebody, nobody knows who, to somebody, nobody knows who, and on behalf of somebody, nobody knows who. I have no ground to presume that Mrs. *Townley* was the agent of the Rector ; and he view I take of this case is shortly this,—Here is a receipt given by somebody, who is not stated to have received it from the Rector, by a person who may be living, and who, if living, must necessarily have been examined as a witness, because it is, after all, a fact that might be proved by him. You do not say that he is dead, and if he is living, he ought, beyond

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beyond all question, to have been examined, for it would have been better evidence; and that is the difference between this case and that of deeds. The man himself should be called, and if he cannot be called, you must prove his hand-writing: and even then you must account for the manner in which the writing has come into your possession, and under what circumstances it has been left with you; but here it is produced merely as a naked paper, without the least concomitant circumstance to show its authenticity. I therefore concur with my *Lord Chief Baron*, and my Brother *Graham*, that this evidence ought not to be received.

Evidence rejected.

January 16th.

Where a defendant in his answer states that a modus has been immemorially paid to the vicar in lieu of tithes, and the vicarage be shown to have been established and endowed within time of legal memory, the Court will, notwithstanding the modus be so incorrectly laid, permit it to be re-stated for the purpose of trying the true modus, if an immemorial payment in lieu of tithes has been proved.

PREVOST v. BENNETT.

THE plaintiff, Vicar of *Tisbury* in the county of *Wilts*, filed a bill for an account of tithes, and the defendant in his answer set up a modus of 3*d.* for every cow, and 6*d.* for every calf immemorially payable to the *Vicar* of the said parish, in lieu of tithe of cows, calves, and milk.

On the hearing of the cause, the plaintiff produced his endowment, by which it appeared that the vicarage had been established and endowed within legal memory; and on that being shown,

Wetherell & Spence objected, that the modus, as laid, was untrue, and could not be supported, on the principle, that where a vicarage can be proved to have been endowed within time of memory, a defence of

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an immemorial payment to the Vicar in lieu of tithes totally fails, and the plaintiff is therefore entitled to a decree. They relied on that doctrine having been now fully established by a very recent decision of the Master of the Rolls, in the case of *Scott v. Smith* (*a*), where the modus pleaded, and objection taken to it, were precisely similar with the present; and his Honour held, that, though on the face of the modus as laid, there was no defect whatever; yet, (as the immemorial existence of it was disproved by the fact of the vicarage having been established, as well as endowed since the year 1367, after the time of legal memory, notwithstanding he admitted that such a payment might have been previously paid to the Rector, and that a specific endowment of the tithes covered by it would only operate on the modus,) the Court had no power to recast the description of it as given by the defendants, and therefore he decreed for the plaintiff, with costs.

[*GRAHAM, Baron*, apprized the Counsel for the plaintiff, that the case of *Uhthoff v. Lord Huntingfield* (*b*) which had been decided some time

(*a*) 1st Ves. & B. 148.

(*b*) *Uhthoff v. Lord Huntingfield.*

16 July 1811.

Bill by the Rector, of the consolidated parishes of *Huntingfield* and *Cookley*, for tithes.—Answer, a modus, or annual payment of 7*s.* from time, &c. payable yearly on Lammas Day, old style, by the occupiers of the said lands, called *Huntingfield Park*, to or for the use of the rector of the *said parishes* for the time being, in lieu and full satisfaction of all and all manner of tithes.—Objection, That the parishes having been proved to have been *recently consolidated*, and the rectors, predecessors of the plaintiff, to have been rectors of the parish of *Huntingfield alone*, the modus could not be proved as laid. But

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time ago in this Court, involved a question which bore on the present objection; and that an issue had been decreed there, to try a modus varying from that which had been set forth in the defendant's answer.]

Dauncey & Daniel insisted, that notwithstanding the modus might in that respect be improperly laid, (an error into which they submitted they had been led by the plaintiff having kept back his endowment) they were still in a situation to pray the indulgence of the Court in their assistance, as they had fairly stated their ground of defence, which was a modus, and that was all that was required. They relied, therefore, that the Court would permit them to re-state their modus, and frame their issue agreeably with the fact, and not restrict them to the terms of the answer.

It was replied, that such an indulgence would abolish all necessity for correctness of pleading, and would be a precedent for permitting a defendant in all cases to allege one thing and prove another. If it could be allowed at all, it must be only by way of amendment of the answer, on motion for that purpose; and if it be decided that the Court may interfere to help a defendant in such a case as this, they will enable him to obtain on a hearing, an advantage which would probably have been refused him on a motion for leave to amend.

But the Court directed an issue agreeably to the fact, and allowed it to be framed to meet the inquiry, Whether the payment had been immemorially made to the rectors of the parish of *Huntingfield*?

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THOMSON, *Chief Baron.* It does not appear to me, that any such evil consequences as have been apprehended will be likely to ensue from our deciding that we will aid a defendant in such a case as this. It will be sufficient to decide on those supposed cases when they occur.

The present question is, whether the Court will, notwithstanding the mislaying of the modus by the defendant in his answer, direct an issue according to the truth of the case, where the mistake does not, in point of fact, materially affect the substance of the defence. The evidence of living witnesses establishes an immemorial payment, until the contrary is proved. If the plaintiff had stated his case as it was, namely, a title by recent endowment, the defendant would have been entitled to file a supplemental answer. In the case before the Master of the Rolls, which has been cited, there is this material difference: there, there was a statement in the bill, that the endowment was subsequent to legal memory; and the defendant had intimation enough of the ground on which the plaintiff meant to proceed before he was called on to answer; there was therefore no surprize. It does not appear that the case of *Uhthoff v. Lord Huntingfield* was before his Honour; and I do not think that that case can be distinguished from this in principle.

GRAHAM, *Baron.* There is this difference between this case and that before the Master of the Rolls: The defendant here had no notice of this

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endowment until the hearing; and had the plaintiff stated it before, the defendant would clearly have been at liberty to amend his case. Though I think this case is essentially the same as that before the Master of the Rolls, yet I cannot also but think that if his Honour had consulted us he would have been of a contrary opinion there; nor do I see any dangerous consequence to arise from the Court's extending this indulgence to the defendant, as it requires merely, that the substance of the defence be stated; and the form is immaterial. *Mitchell v. Rabbitts* (*) is another authority, which might have shaken the opinion of the Master of the Rolls. We must therefore allow this defence to be varied in the matter of form, and the more particularly as the defendant has been led into the error by the statement in the bill.

Wood, Baron. I collect this principle from the cases: where a substantial defence is stated the Court will put it in a way to be tried. The substance, is the immemorability of the payment—the form, to whom it has been paid. *Uthhoff v. Lord Huntingfield* is precisely the same as this in principle; and we have also had a late case (†) directly in point, where the modus was stated to have been paid to the Vicar from time immemorial

(*) The Report of this important case will be given in a future number.—It is at present postponed only until the judgment of this Court shall have been revised by the House of Lords, where an appeal from that judgment is now lodged.

(†) His Lordship is presumed to allude here also to the case of *Mitchell v. Rabbitts*, before cited.

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under the same circumstances. The case before the Master of the Rolls differs from this, from notice having been there given to the defendant of the plaintiff's endowment. I think, therefore, that we should consider this as a mere informality.

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RICHARDS, Baron. I concur—because I think the Court is not tied up from exercising a sound discretion; though it is certainly of importance that the pleadings should be sufficiently accurate. The defence in this case is a modus payable to the Vicar, and the defendant does not put him on proof of his title. The defendant might certainly have put in a supplemental answer in this case; and I cannot see any advantage which would have arisen to the plaintiff if this defence had been made by such supplemental answer. If nothing had been heretofore decided on this question, I should have thought the defendant entitled to this indulgence, unless an uniform series of decisions to the contrary compelled me to bend to them; but here there is one case cited of a decision in another Court, and another in this, and they certainly are essentially in opposition; but I think the good sense of the case is in favour of this defendant. I never knew the objection made at the Rolls to have been taken before; and it must frequently have happened that the pleadings were open to such an objection.

END OF THE SITTINGS AFTER MICHAELMAS TERM.

REPORTS
OR
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

HILARY TERM,—55 GEO. III.

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CHRISTIE v. DE TASTET.

*Wednesday,
23rd January.*

The Court will not hear special cause against dismission of a bill, unless notice of the cause intended to be shown be previously given to the plaintiffs.

A Replication filed on the day of cause shewn against dismissing bill is irregular, and the Court will order it on motion, to be taken off the file.

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but on cause shewn, on the 7th of *February* the injunction was continued until the coming in of the answers of the other defendants. In this state of the cause, on the 28th of *November* last, *De Tastet* obtained an order that the bills should be dismissed as against him, unless cause should be shewn on or before the 21st of *December* following, the plaintiffs having (as he urged) taken no measures to procure the answers of the other defendants being satisfied with the operation of the order of the 7th of *February* for continuing the injunction. On the 13th of *December* the defendant obtained another order for dissolving the injunction against such of the plaintiffs as had become bankrupt, or had died, unless their assignees and representatives should revive within fourteen days from the date of the order.

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On the 21st of *December* (the day for shewing cause against the dismissal of the bill by the order of the 28th *November*) the plaintiffs instructed counsel to shew special cause, but as they had not given the defendant previous notice of the cause intended to be shewn, (although they had given notice generally that they intended to shew special cause) the Court refused to hear it on that ground; but, as matter of indulgence, in consideration probably of its being a point of practice not generally understood, they enlarged the order till the 23d of *January*, directing notice to be given in the mean time to the defendant of the cause meant to be shown. The Court on that day disallowed the cause, and made the order to dismiss absolute, with costs to the

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defendant. In the evening of the same day the plaintiffs, to save the bill, filed a replication.

Martin now moved that it might be taken off the file for irregularity; insisting, that no cause having been shewn, the order made itself absolute, and their bill was out of Court,—that by their thus filing a replication (although their bill professed to be for discovery) if not taken off the file, they would derive the benefit of gaining time by an irregularity, and such a proceeding would become a precedent; and whenever ineffectual cause should be shewn, a replication would be filed, and plaintiffs would not, in future, be able regularly to dismiss a bill.

Dancey on the other hand contended that the order to dismiss had been irregularly and improperly obtained in the first instance; and, admitting the incorrectness in point of practice, of not having given notice of the cause intended to be shewn by them, he submitted that the dismissal of a bill, and dissolving an injunction obtained for want of answers, before those answers were put in, and that by such an order as this (which, he said, had been surreptitiously obtained), would be an anomaly.

Per Curiam.—The want of answer would have been good cause to have shewn against the dismissal of the bill; but the present replication is clearly irregular. The plaintiffs might have made an original motion to retain the bill, which would have been the proper course.

Motion ordered.

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Tuesday,
31 January.

MORRIS v. HERBERT.

TAUNTON, W. E. now showed cause against a rule obtained last term by *Holt*, to set aside the writ of *quo minus*, recently issued in this cause, for an irregularity in being tested in the name of Sir *Archibald Macdonald*. He submitted, that, as the writ itself was correct, an immaterial inaccuracy in the mere copy of a process, calculated only to bring a party before the Court, was no ground, for setting aside the proceedings. Similar objections have been ever-ruled. In *Steel v. Campbell* (a) the notice at the foot of a copy of process, tested the 28th of *November*, in the 49th year of the King, required the defendant to appear on the 20th of *January*, 1808, and the Court holding the mistake to be immaterial and harmless, refused to set aside the proceedings. Here the informality is not calculated to mislead, and is less absurd and material than the error in that case.

On the other side it was said, that as a defendant derived his knowledge of the correctness of a writ solely from the copy served, it was necessary that it should be perfect; and if it were defective it must be inoperative.

THOMSON, Chief Baron. The real ground of objection here is, that if the original writ be correct, this is not a true copy, and that objection is conclusive.

Rule absolute, with costs.

(a) 1 *Tant. 434*.

A variance in the body of the copy of process from the writ itself is fatal, and subversive of the process, and subsequent proceedings.

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Friday,
27th January.

Exercise of right of common for far more than twenty years, is not such an adverse enjoyment as will authorize the presumption of a grant, if circumstances of difficulty in preventing trespass appear, from the extent of the common, want of fences, or any other cause which may render it attributable to encroachment, or cause de vicinage.

DAWSON v. The DUKE of NORFOLK.

THIS was an action brought on a feigned issue, by way of appeal from the determination of the Commissioners under an act for inclosing lands in the parish of *Greystoke* in the county of *Cumberland*, to ascertain the extent of the right of common claimed by the plaintiff in respect of his customary tenement in the manor of *Matterdale*.

The terms of the issue were, whether the plaintiff was entitled to common on the waste of *Hutton Soil*, beyond the limits of that part of it called *Westermelfell*.

It was tried at the last *Carlisle* Lammas assizes, before Mr. Justice *Bayley*.

The plaintiff's witnesses, some of whom were very old, proved acts of exercise of commonable rights, by him and his ancestors, as far back as living memory extended, by turning their cattle on parts of the common which were not within the limits of *Westermelfell*, and they were seen depasturing thereby the witnesses on many occasions.

On the other side they put in a judgment on a verdict found in the year 1665, by a special jury, after a view, defining the right of the customary tenants of *Matterdale*, by which their right of com' on *Hutton Soil* was restricted to the limits of *Westermelfell*. That restriction was also further established

established by a similar verdict in a cause of the tenants of *Matterdale*, against the Lord of the Manor of *Hutton Soil*, on an issue as to their right on *Westermelfell* and *Redmire*, directed by the Court of Exchequer, on a bill filed by them against the Lord, to enjoin him distraining on their cattle commoning on *Hutton Moor*, *Westermelfell* and *Redmire*, and which was tried at *Carlisle*, before Sir *Thomas Powell*, in 1685.

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At *Nisi Prius*, the Judge told the Jury, that he was of opinion, that the evidence on the part of the plaintiff was not sufficiently strong to warrant the presumption of a grant in his favour, subsequent to the period when his right of common had been defined by the former verdicts; and that he thought the usage put in proof by the plaintiff, must be considered by them as referrible to encroachment only; and the Jury returned a verdict for the defendants.

Last *Michaelmas* Term *Scarlett* obtained a rule *nisi* for a new trial, on the ground of a misdirection of the Judge.

Topping, Raine, & Littledale, now shewed cause; insisting, that the case had been fairly and properly left to the Jury on the facts in evidence. The learned Judge was not bound to direct the Jury to find a new grant conclusively. He told them, if they should find that the plaintiff had a right beyond the limits of *Westermelfell*, they were to ascertain how far that right extended. The plaintiff could only establish a right of common on

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Hutton Moor generally, by very strong evidence of such an adverse exercise of it as might be deemed an assertion of an independent claim, and would be considered worth being noticed by those whose interest it affected: and not such an enjoyment as this on so extensive a waste as *Hutton Soil*, covering 3,500 acres, from which the defendant could not have driven the plaintiff's cattle entirely, as he had a right of common on that part of it called *Westermelfell*; and there is nothing to prevent cattle straying all over the common. The limits of the three districts, *Hutton Soil*, *Redmire*, and *Westermelfell*, are certainly not ascertained, but the *onus* of shewing the boundary lay on the plaintiff.

As to a subsequent grant, there are no traces of any such thing; and certainly the exercise of right relied on by the plaintiff is not sufficiently cogent to constrain a presumption of one, but is more reasonably referrible to usurpation, license, or vicinage; there can be no reasonable ground therefore for a new trial. The Judge has expressed no dissatisfaction with the verdict. There has been no misdirection in point of law; and the direction and the finding are not inconsistent with the evidence in the cause; on the contrary, if it had been otherwise, we should have tendered a bill of exceptions.

Scarlett & Richardson, in reply, observed, that the foundation of the motion had been avoided in argument, which was not, that the Judge was bound to have directed the Jury conclusively to presume

a grant, but, that he should have left it to the Jury to have so done, if they thought proper, and if the plaintiffs evidence would have justified such a presumption; and that he should not have directed them expressly the other way, as he had done, giving too much weight to the old decision, and too little to the plaintiff's evidence.

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The whole proof of enjoyment and boundary was entirely and strongly in favour of the plaintiff. The Commissioners never have defined the limits of what they called *Westermelfell*, and therefore we were under the necessity of framing the issue generally, as to the right beyond the limits. At all events we gave evidence of exercising a right of common on certain spots where *Westermelfell* certainly did not extend, whatever might be its limits. They put in a map, which they did not prove; and we were entitled to presume *Westermelfell* extended to parts of this tract of common which they could not show to be without the boundary. Mr. Justice *Bailey* was struck with our evidence of enjoyment, which, had the document produced by them not interfered, would certainly have been held sufficient to have given us a verdict; but the record, although one hundred and thirty years old, a period within which a subsequent grant might most fairly have been presumed, and another difficulty which occurred to his Lordship of a customary tenant being incompetent to receive a grant, determined him the other way.

But a customary tenant certainly may receive a grant, as a grant to him would be considered a grant to the lord; and the law would enforce it against

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against the grantor, as a grant to the customary tenant through the medium of his lord. The learned Judge observed, "the Counsel for the plaintiff, say, " as to the usage without *Westermelfell*, there may " be a grant; but there can be no grant to the " tenant; it must be to the lord; but if there was " such a grant, it must have been by deed, and there " would probably be some traces of it." But surely no one can suppose that the rule of law, which authorizes the presumption of a grant after twenty years possession, conscientiously requires to be supported by the fact of an actual grant having ever existed. It is in itself a fiction, created for the sake of peace and security, that by so long an enjoyment disputes may be obviated. But when it was pressed on the Jury, that the feeding sheep between *Ketty Mire* and *Tarn Moss*, indisputably out of the limits of *Westermelfell*, and, in one instance, herding milch cows even beyond *Redmire*, were sufficient to enable the Jury to presume a grant, the Judge observed, that such acts might be attributable to encroachment. But if they had origin in encroachment, it would be an adverse exercise of right, and would authorize of itself the presumption of a grant, and for that reason also there was here a misdirection on the evidence. In *Campbell v. Wilson*, (a) the Court held that a grant might be presumed from twenty years enjoyment of a right of way, although six years before the commencement of such a right all former ways had been extinguished by Commissioners under an inclosure act. Lord *Ellenborough*, on a similar question in the

(a) 3 East. 294.

Court

Court of King's Bench, attributed to Lord *Kenyon*, the emphatic *dictum*, that, rather than disturb a long enjoyment, he would presume twenty acts of Parliament (*b*). *Holcroft v. Heel* (*c*) was a very strong case of presumption, because the grant presumed was of a right of market, which must have proceeded from the Crown, and would therefore have been of record.

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THOMSON, Chief Baron. It is clear, that in 1685 no such right existed as is now claimed by the plaintiff; and if he has any such right it must therefore have been acquired subsequently to that period; and however improbable that may be, yet it might certainly have been the fact; and a clear indisputable exercise of a right of common would have been considered as proving it; but the evidence in this case does not seem to me sufficient to warrant such a presumption; and therefore it was properly left to the Jury to say whether it was not attributable to usurpation. I observe, that the evidence of the exercise of the right on other parts of the common than *Westermelfell*, is on parts of *Hutton Moor* immediately adjoining it. The Judge did not advise the Jury to presume a grant, because it did not appear that the turning of the plaintiff's cattle on the common was generally known to those who had been trespassed on, and on that ground he left it properly to the Jury, whether it was not an encroachment negativing the right, and I see no reason for disturbing the verdict.

(*b*) *Lady Dartmouth v. Roberts*, 16 East. 338.
(*c*) 1 Bos. & Pul. 400.

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GRAHAM, Baron. The ground of this application is, that the direction of the Judge deprived the Jury of the free exercise of their judgment. He intimated his opinion, that the enjoyment proved did not warrant the presumption of a grant; and left it rather to be considered whether it was not a turning on the common, amounting to encroachment—a trespass not effectually to be guarded against.

The plaintiff has taken the *onus* of proving a right on other parts of the common than *Westermelfell*; and it is clear that he exercised a right beyond the boundaries of that part of the moor; because he proved having done so on *Tarn Moss*, which is beyond what the decree calls *Westermelfell*. But then it must be taken to be permissively, because it was neither possible, nor worth while, to keep stray cattle off these wild places. I consider it therefore to have been an exercise of a right of common *pur cause de vicinage*, because there was no obstacle to impede encroachment. No one disputes the authority of the cases cited. The boundaries of *Westermelfell* were not clearly ascertained, nor is it likely they should be so. I am therefore of opinion that the direction was right, and the verdict proper.

WOOD, Baron. I entirely concur in the same opinion. As the only ground of the application is misdirection, it is the only one I shall consider. In 1685 it is pretty clear that the tenants of *Matterdale* had no right to turn cattle on any part of the common except *Westermelfell*.

On

On the present trial, an exercise of right beyond *Westerwelfell* was shewn, and such an exercise might perhaps, in some cases, be evidence of a grant.

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I abide by the Judge's report, and not by what Counsel state from their briefs. And as from that it appears, that he left it to the Jury, to say whether the plaintiff's exercise of the right was referrible to usurpation or otherwise, I think it was rightly left to them; and in expressing his opinion to be against the presumption of a grant, I cannot say that he has done wrong.

RICHARDS, Baron. I am entirely of the same opinion, for the reasons already given.

Rule discharged.

CHATFIELD v. FRYER.

Wednesday,
February 1.

IN the course of the hearing of this cause, which was by bill filed by the Vicar of *Chatteris*, in the isle of *Ely*, for an account of tithes, it was attempted on the part of the defendants, to read the deposition of *Wm. Drake*, in support of the defence set up by their answer, which was, that, as to a certain tract of land called *Acre Fen*, it never was titheable within the memory of man; and that the impropriate Rector, from time immemorial,

Composition
real by grant
of land in
lieu of tithe,
not proved
by reputation
of the fact of
such an agree-
ment having
existed, and
being the
origin of the
exemption
claimed,
although
corroborated
the exemption
proof.

by evidence of non-payment of tithe for the district, claiming unless a deed, or evidence of one having once existed be put in

and

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and before the endowment of the vicarage, held certain lands, within the parish of *Chatteris*, called the *Miles*, in lieu thereof; and that the commoners of *Acre Fen* have during all that time held the said fen discharged from the payment of tithes.

The witness, who was sixty-seven years of age, deposed, that "he had heard his father, who was "sixty-eight years old when he died, which was "about thirty-six years ago, and also one *John Hudson*, a very old man, who died before the deponent's father, and many other old persons, "say, that they had heard, that the said lands "called the *Miles* were formerly given to the "Vicar of *Chatteris* in lieu of tithes of *Acre Fen*."

It was proved that tithes had never been paid for *Acre Fen*.

Martin, Agar, & Bernal, objected to the admitting such hearsay evidence of a gift, without showing some traces at least of the existence of a deed. Such a defence is a composition real; and evidence should be given of its commencement; whereas it is laid as existing before time of memory, and some evidence of possession is necessary to be given in support of it. If not a composition real, it is a prescription in *non decimando*, and the ground of exemption must in that case also be shown.—*Heathcote v. Mainwaring* (a); *Bennett v. Neale* (b).

Dauncey & Boteler, maintained that the objection now taken to the evidence went to establish (if it

(a) 4 Gw. 1345.

(b) 1 Wightwick 324.

were

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were allowed) that title was weakened as it became more remote. This is not a composition real, but a modus. Tithes have never been paid for *Acre Fen*, and reputation, supported by uniform non-payment, is the only evidence which the defendants can be expected to bring forward to show the ground on which they claim exemption. *Baker v. Warner* (c).

THOMSON, Chief Baron. The question in this case is, whether the proof of reputation which has been offered is admissible evidence of the fact intended to be established by it. The portion of land called the *Miles* is here described as a boundary of *Acre Fen*, and is alleged in the answer to have been appropriated to and to the use of the impropriate Rector of the parish of *Chatteris*, and his heirs and assigns for ever, in lieu of all the tithes both great and small, arising within the tract called *Acre Fen*, treating it as if there were a Rector who could so bargain for his heirs and assigns. This is said to be supported by the general evidence of non-payment of tithes.

Now this is not a modus in discharge of the whole parish, but of *Acre Fen* only, a tract of land lying within the parish; and in that view it may be questionable if general reputation is applicable, or whether it must not in all cases apply to the parish at large; but when it is offered as evidence of a particular fact, I think it is not admissible under the circumstances of this case. It may be

(c) Not reported, but is expected to be given in the concluding number of *Wightwick*, not yet published.

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evidence

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evidence of a deed within time of legal memory, and previous to the restraining statute of the 13th of *Elizabeth*, but then there should be some proof of the existence of such a deed. No evidence is offered of possession under any such deed, and that I take to be necessary before evidence of reputation can be admitted. On the contrary, the ownership here is proved to be in a person who is not shewn to derive his title from the Rector, and that is certainly too slight to let in this evidence. The case of *Baker v. Warner* was very different; though I think the Court went as far as they could there. But that was a parochial modus, covering all the wood-land of the parish; and the Rector there was in the possession of the two acres called the *Parson's Coppice*. The terriers in that case too were extremely material in supporting the fact, and an issue was ultimately directed, on which a verdict was found for the parishioners. There is a late case of *Ireland v. Powell*, in *Peake's Evidence* (d), where Mr. Justice *Chambre* admitted evidence of general reputation as to the boundaries of a town, but rejected it when offered to prove that houses had once stood where there were then none. And here it is offered as evidence of a particular fact. There is no proof of any purchase under the Rector, but merely of the non-payment of tithes, and therefore I think it is not admissible.

GRAHAM, Baron. This is a modus for a particular district, and is therefore analogous with a

(d) p. 14.

farm

form modis. The language of the answer is contradictory:—in defining the limits of the exempted tract, the *Miles* is described as one of the boundaries; but, taking it as meant, it is, that a conveyance was made of the *Miles* before time of memory, and I do not think that the evidence of tradition supports it. Such evidence is more particularly loose when it is considered to how many facts the witness is to speak:—first, that the *Miles* did belong to the owners of the *Fen*, so as to show that they had power to convey—then, that they did convey it—and finally, that it was conveyed in lieu of tithe of *Acre Fen*. The only persons having an interest seem to be the one hundred and fifty-nine occupiers of houses; but there is not a title of evidence to show they had the power to convey the *Miles*, or that they did do so: and to support such important facts by tradition is the wildest idea, and open to all possible objection. It is hear-say evidence of many facts, fixing them at no precise period. *Non constat*, that the conveyance might not be subsequent to the 13th *Eliz.* and if so, not binding, though sanctioned by a Court of Equity. Or it may be a composition real before the time of *Eliz.* and if so, it must be established by deed, or evidence of it. That I will always hold to be the law of this Court.

This is said to be following up the case of *Baker v. Warner*; but the distinction is great. The Rector there had possession, and on the trial could not account for it. It was obviously also part of the coppice, separated only by a small ditch.

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Tradition is only admissible in generalities, and not to show particular facts. Here too all is conjecture:—If so important a prescription has not been better preserved by the parties, however hard it may be on them, they must suffer for their negligence. The Church has the privilege of *nullum tempus*. But the non-payment of tithe in this case is otherwise to be accounted for, and that by the state of the place itself, which was a sunken fen covered with water, and that might be the cause of the boundaries of the parish being unknown. But if the parties had proofs they should have preserved them. I should certainly pay no regard to such evidence as is now offered, were I in the situation of a Jurymen; but I think it inadmissible in point of law. Tithes must not be taken from a man by such evidence; for as well upon such testimony might you dispossess a man of his real estate.

Wood, Baron. I am sorry to be so often obliged to differ from the Court in these tithe causes; but I am for supporting immemorial enjoyment, and ancient usage, and think that no fair evidence should be suppressed, if it can be received. I do not think that there is one law for the clergy, and another for the laity. If from usage I am to infer an endowment in favour of a Vicar, I will also from usage infer that he may have parted with his rights. In *Lady Dartmouth v. Roberts* (e), the defendant proved a title by endowment to tithe of hay, but it was proved to have been always paid to the Rector; and Lord *Ellenborough*, delivering the

(e) 16 East. 338.

judgment

judgment of the Court, said, that the tithe of hay might have been dissevered from the vicarage by grant; "and in favour of modern enjoyment, which is the best interpreter of right, where documentary evidence does not exist, we will, (in conformity with Lord Kenyon, who said, that he would presume two hundred deeds, if necessary,) presume here that a disseverance took place." It never occurred to him that any writing need be produced. I have already expressed my sentiments in the case of *Bennett v. Neale* (*f*); and I hope that some one will carry the point to the Lords. Here (stripping it of any informality) is the substance of the answer a legal defence?—No doubt it is. In the Bishop of *Winchester*'s case (*g*); a prescription for tithes in respect of a pension paid to the parson under similar circumstances was adjudged good.

Here the case is, that the owners of *Acre Fen* gave some land, (no matter if part of *Acre Fen*, or not) in lieu of tithe. The evidence is non-payment during living memory either to Rector or Vicar, both joining against the parishioner, adverse to the occupier who cannot get at the title of the Rector. In fact the lands have never paid tithe. I agree that reputation is no evidence of a fact, but here it is bottomed on a fact,—the fact of perpetual non-payment of tithe; and may not reputation be admitted to explain that fact? It was so admitted in *Baker v. Warner*, and here also it is not reputation of a fact, but of the original cause

(*f*) 1 *Wightwick*, 324.

(*g*) 1 *Gw.* 167.

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FRYER.

But hearsay evidence is in some instances admissible, and even in tithe cases; *Stransham v. Cullington* (g), and *Congley & Hall* (h). In *Baker v. Warner* the same objections were urged, and the same cases cited, but the Court sent it for trial. That only differed from the present case there, in that there was a spiritual Rector, who is a perpetual body. Here there is an inappropriate Rector, and if the land was once appropriated to him, any one now holding it must claim under him. It might have been so appropriated subsequent to the Vicar's endowment as well as before. The parishioner can have no other proof; and though its weight may not be so strong, I am at least of opinion that this is admissible evidence.

RICHARDS, Baron. I submit to principle in all cases, as well of tithe as other; and if there be any difference in the rules of evidence, as respecting ecclesiastics and laymen, the law makes that difference. I am not to make the law, or find fault with it, should it not be what I think it ought to be. A series of decisions has established, that a composition real cannot be proved without a deed, or evidence of one. I hold myself bound by the authorities; and it would be a dangerous precedent if every Judge were permitted to doubt them. The object of the proposed evidence is to prove certain facts. Now reputation is not evidence of a fact,

(g) *Cro. Eliz.* 228. (h) *2 Roll. Rep.* 125.

still

still less of three, four, or more facts. The answer certainly states a sufficient defence, if proved; but whether it be proved or not is now the question. It is supposed, that at some time the Rector was entitled to tithes of the whole parish. I will not now inquire if reputation be applicable to part of a parish; but taking it to be so, the Rector is supposed to have agreed with certain persons to take some land in consideration of giving up the tithe of *Acre Fen*, a place then unreclaimed. If that were so, there must necessarily have been some conveyance. There must also have been possession and enjoyment, and they who have successively enjoyed it ever since must have deduced their claim from him. But as it is not proved that the Rector does, or ever did, enjoy it himself, every one of those facts must be proved by this evidence of reputation: and can such evidence be received to prove any one of those facts?—clearly not—Still less should it be admitted to establish all. I agree with the determination in *Lady Dartmouth v. Roberts*, but that case does not apply here. I think this evidence is not only inadmissible in tithe causes, but that it could not be received any where, in any case.

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Evidence rejected.*

* Sed vide *Harwood v. Sims*, 1 *Wightwick* 112, where Lord Chief Baron *Macdonald* is reported to have said, "the essence of reputation is, that if you prove a fact, as for instance, payment of a sum of money, it must be accompanied with this, that it was so paid in consequence of a reputation."

1815.

Saturday,
4th February.

TURNER v. WHEATLEY.

Surrender of the principal by bail below after bail

above put in, but not perfected, though before assignment of the bail bond, does not discharge the bail to the sheriff after the return of the writ.

CAUSE was shewn against a rule nisi to set aside the assignment of the bail bond.

The defendant was arrested in *Hilary 1814*, and gave bail to the sheriff. Bail above were afterwards put in, but did not justify, and the bail below entered into an arrangement with the plaintiff, by which they engaged to pay the debt and costs in two months, in consideration of proceedings on the bond being stayed. In consequence of such arrangement no assignment of the bail bond was taken; and on the 4th of *October* the defendant was surrendered to the Fleet by the bail below. On the 21st of *November* last the bond was assigned, and the bail were served with process; and now the present motion was made on the ground of the previous surrender.

Abbott, on the part of the plaintiff, urged that the forfeiture of the bond was not cured by the surrender, and that nothing could discharge the bail below but an actual justification of bail above. In this case, when time was given by the plaintiff to the bail to settle the debt and costs, they were irretrievably fixed.

Dauncey, in support of the rule, pressed the facts of the bail below having surrendered the principal before the assignment of the bail-bond,—

of

of bail above having been put in, although they did not justify,—and of the plaintiff having obtained all he originally could have had, (the body of the defendant,) by virtue of the surrender; and he cited the cases noticed in *Impey's Practice, K. B.* p. 194. In the two first *Meysey v. Carnell* (a), and *Jones v. Lander* (b), the bail above had surrendered the principal, and although they had not justified, the Court allowed the application on payment of costs; and in the other, *Anon. Hil. 1812*, the same application, under circumstances consisting with those of the present case, was granted on a motion by the bail below.

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TURNER
v.
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But the Court were of opinion, that bail above only, could surrender the principal after the return of the writ; and that bail to the sheriff could not discharge themselves from their responsibility, but by the justifying of bail to the action; for though the assignment might be subsequent to the surrender, yet, as the bond was forfeited before, the render did not exonerate them.

Rule discharged, with Costs.

MITCHEL v. RABBETTS.

THE rule *nisi* for a new trial in this cause (which was an issue out of the Equity side of the Court) having been discharged, and the *postea* delivered to the plaintiff, the cause was intended to be set down in course on *Thursday* the 9th instant.

(a) 5 T. R. 534. (b) 6 T. R. 753.

Dauncey, Wednesday,
8 February.

The return of the *postea* on an issue, is a setting down of the cause for hearing, and the Court will not grant a motion to exclude it for a time from the paper.

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Dawney, now moved on the part of the defendants, that it might not be set down in the paper of causes upon the *postea* this term, the defendants having lodged appeal to the House of Lords.

Rouppell & Gifford opposed the motion.

Per Curiam. The cause is set down when the *postea* is returned *ipso facto*; and the usual course is to move that it be continued. The present motion cannot be complied with.

16 Gen 23	Motion refused, with costs.
13 Febr 1817	3 Febr 1817 663
6 Mar 1821	21 Mar 1821 356
3 Mar 1811	27 0 ⁰ 102
10 Mar 1821	
HERVEY and others v. M'LAUGHLIN and others.	
15 Mar 1821	
364 34 13ia 1821	

Thursday,
9 February.

A bequest over in case of the death of a devisee generally, and not expressly referrible to any certain time or event within or before which such dying must occur to give effect to the remainder—held not necessarily to refer to a dying in the life-time of the testator; but will be construed so as to give effect to such an intention on the part of the testator as may be presumed, from the language of the will, to have been his object. Thus a bequest of personal property to *A.* for life, remainder to her three children in equal shares, and in case of the death of either or any of them, the share of such so dying to go to their children, is a vested interest, subject to be divested if either of the legatees in remainder die during the life of the particular tenant; and his share then becomes the property of his children, and not of his personal representatives.

“belong

"belong to the children, or child, if but one, of the 1815.
 "persons so dying." There was also a general HERVEY and
residuary bequest to the children of the said *Eleanor* others
Todd, the tenant for life, and the testatrix appointed *M'LAUGHLIN*
the defendant *Henry M'Laughlin*, her executor. and others.

The testatrix died in 1792.—*Eleanor Todd* (the tenant for life) died on the 22d of November 1810, unmarried.—*George Todd*, one of the three children of *Eleanor Todd*, the tenant for life, died in her life-time, leaving his wife *Frances*, him surviving, and two children, *John*, and *Elizabeth*, the other plaintiffs, infants.—*Eleanor Todd*, another of the children of *Eleanor Todd* the tenant for life, married *Tobias Wheatley*, who died.—She then married *Francis Joseph*, and died in the life-time of her mother, without issue, leaving her said husband *Francis* (one of the defendants) who administered to her effects.

Elizabeth, the other of the three children of *Eleanor Todd*, the first-named plaintiff in the cause, married *George Hervey*, and by a settlement made previous to her marriage, assigned her interest in the two sums of 800*l.* to the defendants *Richard Allaway* and *Henry M'Laughlin*, on certain trusts. *George Hervey* afterwards, in the life-time of *Eleanor Todd* the tenant for life, died, leaving his wife, without issue, and having previously sold his wife's share and interest in the legacy to *William Mercer*, another of the defendants.—*Elizabeth Hervey* on his death administered.

On the death of *M'Laughlin* intestate, *Elizabeth Hervey* took out letters of administration *de bonis non,*

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HERVEY and others v. M'LAUGHLIN and others. non, on the behalf of herself, and the other plaintiffs, *John* and *Elizabeth*, the infant children of *George Todd*, and *Frances* his wife one of the defendants in the present suit, and afterwards filed a bill against the representatives of the said *Henry M'Laughlin*, the said *Richard Allaway*, the said *William. Mercer* *, *Francis Joseph*, and *Frances Todd*, praying that the defendants might set forth their several claims on the personal estate of the testatrix †, and that what might be found due to the plaintiff *Elizabeth Hervey*, might be paid to her; and that so much of the two sums of 800*l.* as should appear to be due to the other plaintiffs, the infant children of the said *George Todd*, might be laid out to accumulate till they should attain the age of twenty-one.

9 February.

All proper parties having been ultimately brought before the Court, the Deputy Remembrancer having made his report, and the cause now coming on

1814.
November 21.

* The cause had come on this day for further directions on the Deputy Remembrancer's report, to whom it had been referred by the decree of the Court, in the usual course, to make the necessary inquiries; but the person interested under the assignment, on the marriage of *Elizabeth Todd*, not having been made a party, the Court ordered it to stand over till a supplemental bill should be filed for that purpose.

† The defendant, *Francis Joseph*, claimed the share of his late wife *Eleanor*, and *Frances* the widow of *George Todd*, the share of her late husband; submitting that such shares had vested in interest, and were therefore transmissible to the representatives of the original legatees, who had died in the life-time of the tenant for life. The report declared that one third part belonged to the Plaintiff, *Joseph* and *Elizabeth Todd*; another to the defendant *Francis Joseph*; and the other to the plaintiff *Elizabeth Hervey*.

• for

for further directions; the question was stated, and admitted to be, whether the words of the will distinguished by italics were referrible to the death of either in the life-time of the testatrix, or of the tenant for life: being the criterion for deciding the claim as between the widow of *George Todd* on one side, and his infant children on the other.

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HERVEY and
others
v.
McLAWRENCE
and others

Martin & Buck, for the plaintiffs, premised, that there being no case to be found in point, the Court must be guided by analogy, and the most natural construction of the words: giving effect as far as possible to the intention of the testatrix. They cited the case of *Hallifax v. Wilson* (a) as affording a rule of construction applicable to this case. There the Master of the Rolls said, that the question was, on what event the shares of the nephew and neices were to go over, and gave it as his opinion, that the period appointed for payment of the legacies was the time to which the subsequent words, creating a contingency, should be construed to refer.—So here, the death of *Eleanor Todd*, (the mother,) was the time of payment of the legacies, and to that period the dying of the legatees must be referrible on the principle laid down in the case cited. Then it was that the interest in the legacies first vested, and consequently the children of the legatee dying before the period when the bequest subject to the life-interest of *Eleanor Todd*, (the mother) became payable, must be considered as entitled to the share of the party so dying, which, in that event, was expressly devised over to them: and not the personal representative of such legatee.

(a) 16 Vesey 168.

Simpkinson,

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Simpinson, for the defendants *Francis Joseph Harvey and others* and *Frances Todd*, admitted that the point depended on the time when the three children of *Eleanor Todd*, (the tenant for life) took an interest in the sums bequeathed. He observed, that it had been conceded, that if the terms of the bequest had not gone farther than the words "to be divided between them in equal shares," the legacy would have vested. The difficulty therefore occurs on the clause giving the shares of such as should die to the survivors, speaking of a certain event in a contingent phrase: and the Court are called on to say what is the true construction of those words so inaccurately employed. In *Hinckley v. Simmons* (*b*), a bequest to one, and in case of her death over, was held to be an absolute bequest, and so in the case of *Lowfield v. Stoneham* there cited from *Strange, Cambridge v. Rose* (*c*), and *Webster v. Hall* (*d*). He then submitted, that the dubious clause in this will must be resolved according to the general rule established by the cases, and if so, that the dying in this case would be referrible to the death of the testatrix; and adverted to the decisions in the margin (*e*), where it had been held that bequests over, on the death of legatees, without fixing a determinate period, must be construed to apply to the death of the testator. In *Perry v. Woods* (*f*), though there was a previous

(*b*) 4 Ves. 161.(*c*) 8 East. 12.(*d*) *Ibid.* 410.(*e*) *Stringer v. Phillips*, 1 Eq. C. Abr. 292. *Ld. Bindon v. Earl of Suffolk*, 1 P. Wms. 96. *Rose v. Hill*, 3 Bur. 1881. *Roebuck v. Dean*, 2 Ves. 265, & 4 Brown 403.(*f*) 3 East. 204.

estate for life, and the tenant for life survived those in remainder, yet that remainder was held to be a vested interest, and divisible among the representatives of the remainder men on the death of the particular tenant, *Maberley v. Strode* (g), and *Brown v. Bigg* (h) were cited to the same point. In the latter the bequest over to *Elizabeth Bigg*, the child of one of the testator's nephews, was held to have vested in her, and was decreed to her representatives notwithstanding she died in the life-time of the previous tenant for life. In the case of *Hallifax v. Wilson*, cited for the plaintiffs, the bequest there was given to the legatees expressly at the age of twenty-one, and to be payable after the death of tenant for life.

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MC LAUGHLIN
and others.

At all events, and whatever be considered to be the true construction of the uncertain and inaccurate part of this will, the defendant *Francis Joseph*, whose wife took an absolute interest, and left no child to take in the event of her dying, is entitled to her share. In *Harrison v. Foreman* (i), it was held that a vested interest remains vested, if the contingency upon which it is to be divested never happens, as much as if the contingency had never been annexed to it; and in *Smither v. Willock* (k) where the devise over of personal estate was to several, and in case of the death of either during the life of the tenant for life, to be divided between his children, it was held not to be divested on his

(g) 3 East. 450.
(i) 5 Ves. 207.

(h) 17 Ves. 279.
(k) 9 Ves. 233.

dying

1815. *HERVEY and others.* dying in her life-time without children, the event never having happened.

v. M'LAUGHLIN and others. *Martin.* in reply. The cases cited are not sufficiently in point to influence the decision of the Court. The observation made in one of them, (*Perry v. Woods*), that the construction adopted in the greatest number was with a view to prevent lapse, and consequent intestacy (which will not be the case here), and that others of them related to the disposition of the testator's property, bequeathed in tenancy in common, totally destroys their applicability and effect in the present case. The object too of the cases is in general to give efficacy to the testator's intention, and that is all the plaintiffs wish in this case. The natural period during which the testatrix meant to guard against contingencies is that which intervened between her death and the time of distribution,—the death of the tenant for life. And this will must be construed rather by a fair exposition of the words, than by any rule of law.

THOMSON, Chief Baron. It has been very properly admitted, that there are no cases expressly in point, and certainly none of those which have been cited appear to bear on this question.

The testatrix had bequeathed these two sums on trust, to pay the dividends to *Eleanor Todd*, for her life, for her sole and separate use.

[Here

[Here his Lordship repeated the bequest of the will as already stated, observing that the clause in italics was that on which the difficulty arose.]

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HARVEY
and others
v.

M'LAUCHLIN
and others.

The alternative of that bequest the executor was to execute, and the question is, when? Certainly, I take it, on the death of *Eleanor Todd*, the mother. The shares therefore vested in her three children, subject to be divested in case of the death of either of them in her life-time.

Of the events which have happened, one is, that *George Todd*, one of the three children of *Eleanor*, died in her life-time, and he left two children.

On that event it becomes material to inquire, whether we are to construe these words as referrible to a dying in the life-time of the testatrix, or of the tenant for life; and that seems to me to be the natural construction, which goes to substitute the children of those dying in the life-time of the tenant for life in the place of their parent; and as that intention is apparent on the face of the will, I consider the plaintiff's construction to be the true one.

There can be no question as to *Eleanor's* share.

GRAHAM, Baron. The question here is between the representatives and the children of *George Todd*. With regard to *Elizabeth* there can be no doubt, because she survived all events; and there is as

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little

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and others

little in respect to *Eleanor*, because she died without children.—I consider the shares as vesting, subject to being divested by either dying, leaving children. A variety of cases have been cited to show, that where there are words expressive of such a contingent event as this, which is further dubious as to the time to which we are to look for its occurrence, they are referrible to the period of the death of the testator :—If that were the construction here, *George Todd* took an absolute interest in the legacy, and his personal representatives would be entitled to it. But this is not a case wherein we are called on to construe the words otherwise than according to their plain import, which is, that the children should be substituted in the place of their parents who might die, in either case ; nor is there any necessity to refer to authorities. *Elisabeth* is clearly entitled to one share ; *Eleanor*'s representatives to another ; and *George*'s children are to be put in his place, and take his share, and his personal representatives have no interest.

WOOD, Baron. There can be no doubt of the testator's intention in this case. He has given first to *Eleanor Todd* ; then it is expressly given to these three children after the death of their mother ; then to any children of either dying in her life-time. Now *George* died in the life-time of his mother ; then his children became entitled ; *Eleanor* takes it absolutely, having no children ; and therefore it devolves on her personal representatives, as no contingency took it away from her.

RICHARDS,

RICHARDS, *Baron*. I feel satisfaction in finding it not necessary, looking at this will, to decide by cases. There are none in point; and we must interpret it as it is expressed. On one side it is said, the doubtful clause refers to a dying before the death of the testator; on the other, of the tenant for life. The legacy is given to a trustee who represents all the parties. Nothing is said in the will of children, till the death of tenant for life, and then it is that the sums are given over; no doubt it was a vested interest in point of law. But then, what is the meaning of the subsequent words, qualifying that vesting: "and in the case of the death of either of them, the share of such as may die to go to and belong to the children or child of but one of the persons so dying?" It is impossible from these words not to be satisfied that the children of either dying before the tenant for life, were intended to take the benefit of the bequest to the parent. I entirely concur with the opinions already given.

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HARVEY
and others
v.
M'LAUCHLIN
and others.

Report confirmed.

1815.

Friday,
February 10th.

GWILLIAM v. BARKER.

Sheriff taking corn in the blade under a *fieri facias*, and selling it before rent due, is not liable to account to the landlord of the defendant, under the statute of *Anne*, for rent accruing subsequently to the levy and sale, although he is given notice, and though the corn be not removed from the premises until long afterwards, when a considerable proportion of rent has become due.

The landlord's remedy in such case is by distress.

BOLLAND obtained a rule in Michaelmas Term, calling on the plaintiff to show cause why the Sheriff of the county of *Salop*, should not pay over to *Edward Plowden* the sum of 200*l.* due to him from the defendant for rent, out of the produce of the crop of grain of the defendant, taken and sold under a writ of *fieri facias* issued in this cause. The defendant was tenant to *Plowden*, at a rent payable on the 25th of *March* and 29th of *September*.

The plaintiff a judgment creditor of the defendant, had sued out execution, under which the sheriff had taken a crop of green wheat in the blade, which was advertised for sale, and sold by public auction on the 21st of *March*, to the highest bidder, to whom the Sheriff executed a bill of sale. The purchaser afterwards assigned it to the plaintiff on the 24th, one day before any rent became due to the defendant's landlord. The corn of course was suffered to remain in the ground till the harvest season, and then on the 29th of *August* the landlord served the proper parties with notice to pay the rent then due, before the removal of the corn, and of his intention to make the present motion.

It was accordingly now moved, notwithstanding the case of *Hoskins v. Knight* (a), where it was

(a) 1 Maule & Selwyn, 245.

ruled,

ruled, that a landlord was only entitled to interpose a claim for rent actually due at the time of the taking, and of *West v. White* (b), where the execution of a bill of sale was held to be a removal; on a suggestion that a material distinction should be taken between a dead chattel and one growing: and the Court considering it a new and important case, granted the rule.

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G. WILLIAM
v.
BARKER.

Jervis & Püller now showed cause (c). They cited the words of the statute (8 Ann. ch. 14,) that no goods shall be liable to be taken by virtue of any execution; "unless the party at whose "suit the said execution is sued out shall, before "the removal of such goods from off the pre- "mises by virtue of such execution or extent, "pay to the landlord of the said premises, or his "bailiff, all such sum or sums of money as are or "shall be due for rent for the said premises, at the "time of taking such goods or chattels by virtue of "such execution;" and rested the question on the construction of the words. Here, there was not only taking before rent due, which would alone have put the corn in *custodia legis*, but an actual *bona fide* sale, and an assignment made, which is tantamount to a removal, and the sheriff becomes *functus officii*.

(b) *Barnes*, 211.

(c) It may be proper to observe, that no question of collusive fraud, arising out of the extremity of the sale, and sudden transfer of the bargain to the judgment creditor himself, was made, in the argument, but it proceeded entirely on the point of law.

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GUILLIAM
v.
BARKER.

Com. Dig. title *Execution*, letter C. 3, 4. He then receives this notice five months afterwards. And a sheriff who has done his duty to the utmost extent ought not to be called on in this summary way to pay rent not due at the time of his selling goods under a levy. The practice of relieving, on motion, first obtained, after the statute, in the case of *Henchest v. Kimpson* (*d*); but certainly this is not a case remediable by way of rule, even if there should be thought to be cause of action.

[A question arose with the Court, whether the sheriff was bound to give notice of the execution, or the landlord of the rent in arrear.]

Dauncey & Bolland in support of the motion. The proposition against the landlord is, that the judgment creditor has not only a right to seize the green corn, but to use the land for five months after to ripen it. But they come within the act in fact; for it plainly has in contemplation goods removable at the time of taking, and cannot apply to such goods as this corn, which was not in a state fit to take. In *Coke's 2d Institute*, what shall be accounted issues of the land, under the Statute of *Westminster* 2, are enumerated corn in the grange, and all other moveables, as hay in the barn, and other moveable or personal goods whatsoever, except those things belonging to his riding, his apparel, and utensils

(*d*) 2 *Wills*. 141. & see *Woodfall's Book*, 364.

of

of house. *Pool's* case (e), is only an authority enabling the sheriff to cut down and sell, and he must take it as he finds it.

1815.
GUILLIAM
v.
BARKER.

THOMSON, *Chief Baron*. I really see no reason why the landlord should not have distrained the corn. The execution was executed, and the goods of a stranger were remaining on the premises. His remedy should have been by distress. I do not think the statute applies to corn in the blade; it would be a monstrous thing to cut it in such a state.

GRAHAM, *Baron*. I do not apprehend that you can get over the words of the statute.

Per Curiam.

Rule discharged.

STOCKDALE v. BLENKIN.

THE defendant had been held to bail by the name of *Blenkhorne*, in an action of trover under a Judge's order, made out against him in that name.

*Saturday,
February 4th.*

Owen moved for a rule *nisi* that the bail-bond might be delivered up to be cancelled, but

Misnomer of
a Defendant
held to bail, no
ground for
cancelling the
bail-bond, but
must be
pledged in
abatement.

The Court held that the only mode of taking

(e) *Salkeid.*

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advantage

1815.

STOCKDALE

v.

BLENKIN.

advantage of the error was by plea in abatement, when the plaintiff would have a right to reply; whereas in such an application as the present he must answer, if at all, by affidavit, and thus every plea in abatement might be superseded by motion on affidavits.

Rule refused.

Monday,
February 13.

The Court will order a new trial on questions deciding important rights, where the Judge expressed an opinion on the trial contrary to the verdict, although he afterwards report that he was not dissatisfied with the finding of the jury.

The Earl of MOUNTEDGEcombe v. SYMONS.

THE plaintiff had brought an action on the case for diverting a water-course, which came on before Mr. Justice *Dampier* at the last assizes for the county of *Cornwall*. The Jury found a verdict for the plaintiff.

Last Michaelmas Term *Gazelee* obtained a rule *nisi* for a new trial, on the ground that the finding by the Jury was adverse to the direction of the Judge.

The Judge reported, that on the part of the plaintiff it was proved, that the ancient bed of the water lay between the two estates. The defendant answered that, by proof that the stream had been diverted since the year 1790, and proved that he had used it to work a lead-mine till 1803, when the work ceased: and that as soon as the mine was re-opened he again employed the water as before. The judge then observed, that during the trial his inclination was in favour of the defendant; the

and that had he been on the Jury he should so have found; but he added, that he was not dissatisfied with the verdict as it stood.

1815.

The Earl of
MOUNT-
EDGECOMBEv.
SYMONS.Friday,
January 27.

Lens (Serjeant), *Burrough* and *Gifford*, showing cause against the rule, relied, that as it had been a mere question of fact properly left to the Jury (who had a view), on the fair preponderance of evidence their verdict ought to be conclusive. When the defendant's mine ceased to work, the water reverted to its original channel until the obstruction which had been made the subject of the present action; and there had not been an uninterrupted adverse possession of twenty years by the defendant.

Jekyll & Gazelee, in support of the rule, expressed surprise at hearing the conclusion of the Judge's report, disavowing his dissatisfaction with the verdict, after having at *Nisi Prius* summed up strongly in favour of the defendant; they urged in favour of the defendant's right, as the strongest point in the cause, that, during the whole thirteen years, from 1790 to 1803, there had been no complaint on the part of the plaintiff. The view made no difference in the case; the water originally running between the two estates.

Per Curiam. We will take time to look into the report.

THOMSON, Chief Baron (having stated the case and report). This question is, whether the property

1815

The Earl of
MOUNT-
EDGECOMBE
v.
SYMONS.

property in this water belongs to one party or the other, and is certainly one of very considerable importance to their interest, as the verdict of the jury will have the effect of conclusively deciding the right on all future occasions; and therefore we think that it ought to go down to another trial, defendant paying the Costs.

Rule absolute.

LEVI v. WATERHOUSE.

Monday,
February 13.
Notice by a
carrier that he
will not be
responsible
for goods sent
to be conveyed
by his
coach, unless
paid for ac-
cording to
their value, is
not defeated
by proof that
the book-
keeper who
received them
might have
inferred their
value.

THE plaintiff, (a silversmith, in *Exeter*,) brought an action on the case against the defendant as a common carrier, (the proprietor of the *Bath* and *Exeter* mail coach) to recover damages for the loss of a valuable parcel intrusted to the care of his servants, to be conveyed from *Exeter* to *London* by his coach.

The declaration consisted of four special counts, and a count in trover, and the defendant pleaded the general issue.

On the trial, at the last summer assizes for the county of *Devon*, it was proved on the part of the plaintiff, that, on the 16th of the preceding *April* he delivered to the under book-keeper at the mail-coach-office in *Exeter* a brown paper parcel, enclosing 200 guineas, addressed to *London*, who booked it, and signed a memorandum acknowledging the receipt of it. It was also proved that the

the book-keeper knew the value of its contents, and that on that consideration he had caused it to be put into the banker's bag for greater security. The parcel arrived in *London*, but was not delivered at the place of its destination; and was ultimately lost.

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LEVI
v.
WATER-
HOUSE.

The defence was, that the defendant was discharged from responsibility by the now usual notice that the proprietors would not be accountable for parcels above the value of 5*l.* unless entered as such, and paid for accordingly.

The counsel for the plaintiff contended, that as the defendant knew the value of the parcel, and as his servants had been guilty of fraud, or negligence, he was not entitled to the protection of the notice, on the authority of *Beck v. Evans* (a); but *Gibbs*, C. J. ruled, that the mere knowledge of the value did not take the present case out of the rule; and said, that he thought there had not been such misconduct on the part of the defendant as made him liable; and refused to reserve the point.

The Court having, on the application of *Borough*, for a new trial, founded on a mis-direction of the Judge, made a rule to show cause why the verdict should not be set aside, and a new trial granted,

11 November.

Lens & Pell, Serjeants, now showed cause. They objected to the distinction attempted to be introduced, of the knowledge of value in such con-

Friday,
January 27.

(a) 16 East. 144.

tracts

1815.

LEVI
v.
WATER-
HOUSE.

tracts as these being permitted to affect the terms of the agreement in the present case, and to impose a responsibility on a party who expressly refuses to be answerable for goods delivered to his charge, to be conveyed by him as a carrier, unless a premium for such guarantee be previously paid him, proportioned to the value of the goods; he is not compellable to incur the risk without the remuneration on which alone he professes to undertake it; nor if a party choose to take that risk on himself, by not complying with the terms of the notice (which is a special contract) could an express direct communication on his part of the value of the bailment with which he intrusts the carrier, cast on him a liability to indemnify the bailor in the event of its loss. This is the first attempt ever made by any one in the situation of the present plaintiff, to create a distinction between the cases of the operation of this sort of notice, where the value might be doubtful, and where it is ascertained. If a party forego an advantage which he may obtain by paying for it, and thinks fit to become his own insurer, he makes the risk his own. The case of *Beck v. Evans* is no ordinary case:—there, there was gross negligence; and the knowledge of the contents of the cask was important. Here the knowledge is not material; and the question of negligence or fraud went fully to the Jury, who have decided.

Jekyll & Burrough, for the rule. The principle of the decisions that carriers may divest themselves of their common law responsibility by means of such notices as these, is already carried to an extremity

and

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and ought not to be further extended. In *Beck v. Evans* Lord *Ellenborough* expressly says, " The notice, although in its terms it is made to extend to any goods, of what nature or kind soever, cannot be indefinite, but must be construed with reference to the subject matter, and to cases where the party has no means of knowing of what nature the goods are." And Mr. Justice *Le Blanc* says " They (the carriers) are exempted from liability, where the goods are of a much larger value than from a knowledge of their bulk or quality they could possibly guess them to be ; but that cannot apply to goods of a large bulk and known quality, where the value must be obvious. It is singular that the question has not arisen before this ;--perhaps the way to account for it is, that carriers have acquiesced in their liability in such cases." A carrier, if he receives goods, knowing their value, should be responsible for their safe delivery, or he may refuse to take them, and if he does not, but undertakes to carry them, he cannot discharge himself of his liability by such a notice as this, which cannot be contended to be wholly without limitation. As well might an innkeeper adopt a similar practice, and refuse to receive a guest, unless he pay proportionably for the risk which the innkeeper incurs of indemnifying him from the loss of what property he may have about his person. In this case the question was not suffered to go to the Jury on that point, and knowledge of the value of the parcel was denied to be a reason for fixing the carrier with an obligation to be responsible for it.

[GRAHAM,

1815.

Levi
v.
WATER-
HOUSE.

[*GRAHAM, Baron.* The servant in this case was an under book-keeper, and it would be going far to subject the master to unlimited responsibility for the acts of such a servant.]

Were it not so, the daily transactions of commerce, and particularly in affairs of this sort, would be entirely impeded. In this case the book-keeper must be considered as completely identified with his principal.

[*Pell, Serjeant.* As a general proposition it may be right that the relation of master and servant renders the former responsible for the care and efficiency of the latter; but where a servant is acting for his master in effecting a specific contract, the master is not liable for any thing done by the servant beyond the terms of such a contract.]

[*Wood, Baron.* There may be cases of that sort; but whatever a servant does within the compass of his employment is binding on the master.]

Cur. adv. vult.

THOMSON, *Chief Baron*, now gave judgment.—Having stated the pleadings and the evidence—The question is, whether in this case the defendant is liable to the plaintiff for the loss of this parcel, which had been intrusted to his care for the purpose of carriage. On the trial the Jury were directed, that the inference of the value being known to the defendant did not take the case out of the protection of the notice, that the defendant would not be responsible

responsible beyond a certajn amount. It was urged by the Counsel for the plaintiff, that this case came within the principle of the determination in *Beck v. Evans*. But it seems to us that the Chief Justice's direction was right, and such an one as ought to have been given under the circumstances proved. Here there was a special notice given by the defendant, that he would not be answerable, but on certain terms; and there is nothing proved to have been done on his part which amounts to a dispensation with that notice. It appears that the book-keeper might have inferred that this parcel was one of value, but nothing was distinctly said about the actual value, nor did he undertake that the notice should be dispensed with. He did not, therefore warrant its safe conveyance; and on that ground we think the direction correct.

The other ground taken is that of misfeazance, and the case of *Beck v. Evans* was cited; but that was a case occurring under very special circumstances. There was also a similar advertisement in that case on the part of the defendant:—the goods there were a cask of brandy, delivered to be carried by the defendant's waggon, and nothing was said about its value. It happened that the cask, while on the road, was perceived to be leaking, and the waggoner was told of it, and though he stopped at different places he paid no attention to the cask, nor took any step to prevent the leakage, and the brandy was in consequence lost. Now the Court decided against the carrier on that occasion, on the ground of gross negligence and nonfeazance; and I apprehend

the

1815.
LAW
v.
WATER-
HOUSE.

1815.

LEVI
v.
WATER-
HOUSE

the question there would have been materially varied if the cask had been merely missing; and as in that case the Court of King's Bench proceeded on those grounds, and not on the objections taken in the present case, we are therefore of opinion that the verdict in this instance was right, and ought to stand.

Rule discharged.

END OF HILARY TERM.

SITTINGS AFTER HILARY TERM.

55 GEORGE III.

GRAY'S-INN HALL.

NIGHTINGALE v. MERRYWEATHER and others.

1815.

Monday,
February 27.

Service of subpoena issued on an injunction bill, though effected at eleven o'clock on the night of the return-day, and at so great a distance from Town as to render it impracticable for the defendant to appear in time to prevent an injunction for want of appearance, held to be sufficient service.

AN injunction to stay proceedings, after a judgment recovered at law by the defendants, had been obtained by the plaintiff in this case, for want of appearance; and now

Martin moved to set aside the subpoena, and the subsequent proceedings, for irregularity in the service, under the following circumstances, stated to the Court on the affidavits of two of the defendants. One of them swore that he was not served with process till eleven o'clock on the night of *Thursday* the 9th of *February*, (the return-day of the writ) and that his house at *Pendleton*, in *Manchester*, where he received it, was two miles distant from the post-office of that town; and the other deposed

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NIGHTIN-
GALE
v.
MERRY-
WEATHER
and others.

to nearly the same effect. On these facts it was objected, that service of a subpoena on an injunction bill at so late an hour, and at so great a distance from *London*, there being no post from thence on the following day, which rendered it impossible for the defendants to have appeared by *the sitting of the Court on Monday*, (as they were under the necessity of doing, otherwise the injunction would then go against them of course for want of appearance,) ought not to be considered by the Court such a fair service as would entitle the plaintiff to the effect of the injunction which had been so obtained by him. It was suggested, that in the other Courts certain hours were fixed, beyond which the service of process would not be good; that the Court of *King's Bench* had fixed that hour at nine; the *Common Pleas* at ten.

Dauncey and *Girdlestone*, on the other side, relied on the practice of the Court, which, they said, allowed the service of subpoena at any time, on the return-day (a).

Thomson, Chief Baron. The language of the subpoena on an injunction bill is peremptory, and disallows all excuses. This is certainly an extreme point of practice; but as it seems to have been established, that service on the return-day is sufficient, we must hold the service, in this instance, to have been regular.

(a) 1 *Fowler's Practice*, 137.

RICHARDS,

RICHARDS, *Baron*. According to the practice of the Court, if the service had been even on the *Friday* it would have been regular.

Per Curiam.

Motion refused.

1815.

NIGHTIN-
GALE

v.
MERRY-
WEATHER
and others.

ATTORNEY GENERAL v. MUCKLOW.

Tuesday,
28 February.

AN information had been filed against the defendant (a clerk and accountant in the commissariat department), for an account of stores and provisions, the property of his *Majesty*, intrusted to his care, as such commissariat clerk, to the amount of 10,000*l.*, and in the mean time, to restrain him from going out of the jurisdiction of the Court, by an order in the nature of the writ *ne exeat regno*.

And now, on affidavits of the defendant's possession of the stores;—that they were of the value of 10,000*l.*;—that he refused altogether to render his accounts, after repeated applications, and had absented himself from his office;—and that he was about to leave the kingdom.

Dancey moved, That the defendant, within days after service of the order of the Court, should enter into a recognizance, with two sureties, to be approved by the Deputy Remembrancer in the sum of 10,000*l.* not to depart the kingdom until he should have performed such order or decree as the Court should thereafter make in the cause; and that in

The Court will grant an order in the nature of the writ *ne exeat regno*, against an accountant of the Crown, sworn to be about to leave the kingdom without having rendered his accounts; although no precise sum be sworn to by the affidavit made to support the motion, as being the amount in value of the stores unaccounted for. But they will exercise a discretion as to the amount for which they will exact sureties, and will require notice of the order to be given before the attachment shall issue.

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MUCKLOW.

default an attachment should issue without further motion.

The Court expressed great doubt whether they could make such an order under the circumstances; observing, that no precise sum was sworn to be due from the defendant—that that was necessary to found such an order on; as, being in the nature of the writ *ne ereat regno*, it was a proceeding tantamount to holding to bail, or equitable arrest, to obtain which, a sum certain should always be sworn to:—and that to obtain an order to arrest in trover, an affidavit of the value of the goods was required: but here, the defendant (they observed) was called on to enter into a recognizance to the utmost amount of the whole of the stores originally committed to his care, although he must necessarily have expended great part of them in the subsistence of the forces; and might, for any thing that was shown, have exhausted the whole.

It was then urged, that the nature of this case precluded the applicants from depositing to any given amount of the stores in the hands of the defendant; which could not be ascertained until they should be furnished with the account prayed, which was at present withheld; and therefore the Crown was entitled to assume that the whole was now in his possession, none having been accounted for:—that if not, the defendant might move on service to set the order aside: and that thus, unless the Court should interfere, a contumacious accountant might at all times defeat the claims of the Crown by persisting in his refusal to account,

account, however largely he might be in arrear, and leave the kingdom with the money in his hands, thereby depriving the public of the means of restitution.

1815.
ATTORNEY
GENERAL
v.
MUCKLOW.

After some deliberation, the Court ultimately made the following order;

' THAT the defendant do, within a week after service, give security, by recognizance, in this Court, not to depart this kingdom till he shall have appeared to, and fully answered, the information; and further perform such order or decree as shall hereafter be made in the premises.

The recognizance for himself to be in 2,000*l.*, and two sufficient sureties in 500*l.* each, to be approved by the Deputy Remembrancer, in case the Solicitor for the Crown shall not approve.

In default of complying with these terms, an attachment to issue without further motion*.'

* 27th February, 1753. *Davis v. Heron* (by bill).

On motion and affidavits, the defendant was ordered, within a week after service, to give security, with proper sureties, by recognizance, not to depart the kingdom without putting in his answer, and performing such decree as the Court should award, otherwise attachment to issue. Service on his clerk in Court to be good service.

30th May. Same Cause. The defendant obtained an order to show cause why the preceding order should not be discharged, on affidavits discrediting the person on whose deposition it was founded.

1815.

Wednesday.
March 1.

WYVILL by JOHN WYVILL her next Friend v. The
Bishop of EXETER, JOHN KING, WM. TUCKER,
SUSANNAH MUSKETT, and JOHN MILLS.

1815

A party having contracted with a person, since deceased, for the purchase of an advowson, but has taken no steps during the lifetime of the vendor to enforce the contract, or for a considerable time after her death, (objecting to the title on the ground of outstanding judgments, and a creditor's bill pending) held not entitled as against a devisee to present, if a vacancy occur in the mean time, though he has not renounced his contract, but insists on having it completed.

THE original bill, filed in Michaelmas Term, 48 Geo. 3, stated, that *Frances Spicer King* (being seized in fee-simple of the advowson, or right of presentation of or to the rectory or living of *Down St. Mary*, in the County of *Devon*, under and by virtue of the last will and testament of *Wyndham Sturt*, deceased) devised the same to *John King*, his heirs, executors, administrators, and assigns, in trust, to sell and dispose of the same to satisfy her debts and legacies, and to pay the residue to *Louisa Wyvill*, the plaintiff, and constituted the said *John King* her executor.

That the testatrix died in *January*, 1805, and that *John King* renounced the administration:— That *Mills*, one of the defendants, claiming to be a creditor, administered and possessed himself of the personal effects of the testatrix, which were more than sufficient to satisfy her debts, legacies, and funeral expenses:—That the defendant, *Tucker*, set up a contract, alleged to be entered into with the said *Frances S. King*, in her lifetime, for the purchase of the said advowson:—That the defendant, *Mills*, had, in 1805, filed a bill in this Court against

And if in consequence of his insisting on such right a bill become necessary to ascertain the true claim to the next presentation, which is thereby put in danger of lapse, a decree in favour of the plaintiff will carry costs as far as his claim came in question, although it be part of the decree that, subject to the next presentation, he be permitted to complete his contract.

the

the plaintiff, and defendants, *Tucker*, *King*, and *Muskett*, (since deceased) and *Susannah*, his wife, (who was the sister and heir-at-law of the testatrix) on behalf of himself and the other creditors of the testatrix, for the execution of the will; to which *King* and *Tucker* put in their answers; and that that suit was still depending:—That in *June* then last, the said living became vacant by resignation, and the plaintiff claimed that she had a right to present, or that *King*, in trust for her, ought to present to the said living a clerk of her nomination, but that he refused so to do;—that the Bishop threatened and intended to take advantage of the lapse;—the defendant *Tucker* also claiming a right to present, by virtue of the said alleged contract;

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Charging, that said contract did not exist;—that it was inadequate; and that if otherwise, the defendant *Tucker* had been guilty of *laches*, or had virtually abandoned it:

And prayed that the will might be established, and the trusts carried into execution; and that the plaintiff might present, and the Bishop be ordered to institute and induct her presentee, and be enjoined from instituting any other person.

The defendant *Tucker*, in his answer, insisted on the contract, alleging, that outstanding judgments, and the said creditor's pending bill, had theretofore impeded the performance of it; but that he had always been and then was ready and willing to carry

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it into execution, on a good title being made, and the advowson duly conveyed.

He proved the contract subsisting by means of his agents employed in the treaty for the purchase of the advowson, and his correspondence with the testatrix.

At the Sittings after Michaelmas Term, 1811, the Court decreed*, That *King* (the trustee) should,

* The arguments of Counsel, and the judgment of the Court, as delivered by the then Lord Chief Baron *Macdonald*, on this important case, are briefly given in the following note.

It had been contended, on the part of the plaintiff, that the judgment alleged by the bill to be outstanding, as an objection to the title, was ill-founded, where there were personal assets as here; *Matthews v. Jones* (a); That all the creditors of the original testator might have come in under *Mills's* suit, and a decree of specific performance being in all cases in the discretion of the Court, they would not, under the circumstances of the present case, have relieved the defendant *Tucker* on a bill filed by him to enforce the contract, even if the alleged agreement relied on by him had existence in fact. In *Pope v. Roots* (b), the Court would not decree a specific performance of the plaintiff's agreement to purchase an estate, in consideration of an annuity after the death of the vendor before conveyance, and no payment of the annuity made. In *Viner's Abr.* (c) it is expressly laid down 'that if *A* sells an advowson to *B*, but before the conveyance to *B*, and during the seisin of *A*, the church becomes void, though it remains vacant till after the conveyance to *B*, yet *B* cannot present. 2. *Lutw.* 1631.' The Court does not refer back to the execution of articles in making a decree, but regards the time of the execution of the conveyance, *Blount v. Blount* (d).

(a) 1 *Anstr.* 196.(b) 7 *Br. P. C.* 184.(c) *P. 318. Pl. 11.*(d) 3 *Atk.* 635.

On

before the 1st of March then next, present a fit person to the Bishop, on the nomination of the plaintiff, and at her expense; and that in the mean time the injunction on the Bishop should be continued (except as to the above presentment); and that after such presentment, the defendant *Tucker* should

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On the other side, the counsel for the defendant, *Tucker*, relied on the doctrine of the case of *Mortimer v. Copper* (e), where the contract to pay a certain sum of money, in discharge of a mortgage on it, and also to grant an annuity in consideration of the absolute sale of an estate, was decreed to be carried into effect, although the party died before any payment of the annuity; which was subsequently confirmed, by the case of *Jackson v. Lever* (f).

MACDONALD, *Chief Baron* [delivering the judgment of the Court, having detailed the facts of the case]: The defendant, *Tucker*, has uniformly objected to complete the contract on the alleged deficiencies in the title to the advowson, insisting on a better than that which had been offered him; but he has taken no step himself to enforce the agreement by filing a cross-bill, or otherwise.

December 22,
1811.

The result of the cases on this point is, that where a purchaser has actually accepted a title after contract of sale, if advantage arise on either side before the execution of the conveyance, as by the lapse of a life in the mean time, a Court of Equity will enforce a specific performance, without regarding which party may happen to be benefited or prejudiced by the accident of unforeseen events; but where the title has not been accepted, the Court refuses to decree performance. The cases which have been cited, of *Pope v. Roots*, and *Jackson v. Lever*, are material; but in those the titles had been accepted. The distinction between those cases is, that part of the consideration had been paid or performed in one, but not in the other. In *Paine v. Meller* (g), the decision

(e) 1 Br. Ch. C. 156. (f) 3 Br. Ch. C. 605. (g) 6 Ves. 349.

turned

g If the title
is good

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should be at liberty to complete his said contract, as set forth in the pleadings, on payment into Court of the purchase-money, within two months after such institution of the plaintiff's nominee; the money to be carried to the account of the cause. The Deputy Remembrancer to settle the conveyances, &c.; to take the usual account, and to make his report, with a general reservation of the consideration of costs, and all further directions.

The cause now came on again on the Master's report; and

Fontblanche and *Owen* moved, that the defendant *Tucker* should be ordered to pay the plaintiff costs, which

Douneey and *Cooke* opposed: the Court not having decreed a specific performance of the contract against the defendant *Tucker*, but merely that he might complete the purchase of the advowson,

Acceptance
or non-accept-
ance of title the
criterion of
right to specific
performance of
contracts in
Courts of
Equity.

turned wholly on the question, Whether the title had been finally accepted, and the previous objection abandoned before the day on which the premises contracted for had been destroyed by fire. If the title had not been acquiesced in, the Court would not have enforced a specific performance; but if it had, they would have decreed the execution of the agreement, notwithstanding certain objections had been originally made to the title.

The principle
of the cited case
is inapplicable.

The vendor was
dead, and the
point disputed
was whether
the title
was accepted
upon the death
of the vendor.

In this case, the defendant *Tucker* having rejected the title from the year 1805 to the present time, he cannot support his claim to the presentation to the living on the present avoidance. And it is the opinion of the Court, that the plaintiff, Miss *Wyvill*, is entitled to nominate a person to be presented by the trustee.

if

Permit 1 March
532 Remedy, 6 March
6 March. 355.

if he should be inclined to take it, subject to the plaintiff's presentation to the vacancy;—and because the bill prayed other matters, and was not in effect *Tucker's* suit; and that he ought not to have been earlier driven to the completion of the contract pending a creditor's bill.

On the other hand it was urged, that *Tucker*, by claiming his contract, after having objected to the title for five years, had stood in the way of the presentation to the vacant living, by the trustee of the orphan's estate.

THOMSON, *Chief Baron*, after having stated the substance of the bill and answer, and consequent decree, observed: It appears, that the defendant *Tucker*, after having objected to perform his contract with *Miss King* for several years, has at length chosen to complete it, notwithstanding he has lost his right of nomination in consequence of the Court having decided against him on that point. But having insisted on his agreement, and having asserted in plain terms his right of presentation, he by so doing has rendered the present suit on the part of the plaintiff necessary, and the Court have eventually decreed that his claim was ill founded. Therefore, as far as relates to the advowson, he ought to pay the costs.

GRAHAM, *Baron*, having commented on the case: The conduct of *Tucker* must be construed into a refusal to accept the title, unless sanctioned by the decree of the Court; and yet, had he not insisted on his claim this suit would not have been necessary.

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necessary. It was ingeniously said, that this was not *Tucker's* bill. True; but unless he renounced his claim nothing could be done without the interference of a Court; in the mean time the right of presentation lapsed. It amounts to the same thing as if he had filed a bill for specific performance, praying the Court to decree that his nominee might be presented; and having made it necessary for the plaintiff's next friend to file this bill, it should be considered as if it were his own, the costs of which he would certainly be obliged, on his failure, to pay.

RICHARDS, Baron. This contract is stated to have been made in 1802; the vacancy in the living not happening till 1807 was advantageous to the person then entitled to the beneficial interest. *Tucker's* excuse for not enforcing the contract was, that a good title could not be made, which, if available, would have been weighty. He took no steps however to ascertain that, but when the vacancy occurred, he says, *King*, the trustee under the will of the testatrix, should be considered as a trustee for him. The only point in issue was, *Tucker's* right to present, and the Court thought he had no right to present or nominate. The contract is somewhat like an agreement for the purchase of a reversion, in which case, if the purchaser were allowed to delay the completion of the contract, the object of it would increase in value hour after hour. The Court having decided against him, *prima facie* the costs follow that decision; and then the question arises, whether he has in fact made a suit

suit necessary. Now his delay was the sole cause of it, and his subsequent conduct shows that his excuse was not sincere, and that he had never any solid objection to the title, but had other interested motives for refusing to complete his contract earlier. Had he used diligence, the plaintiff's interest would never have been in jeopardy; the costs therefore ought to be paid by him down to the decree, not indeed all the costs of the parties, but all relating to the contract.

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The Bishop
of EXETER
and others.

The KING v. FREAME:

Friday,
March 3.

[On Extent against *Whitehead & Co.*]

FONBLANQUE, on behalf of the defendant (assignee of Messrs. *Whitehead & Co.*), moved, on an affidavit verifying an account given by the Sheriff of the money in his hands, that the Sheriff of *London* might be ordered to pay into Court, within a week, to the credit of this cause, the sum of 46,710*l.* 12*s.* 7*d.* part of the money in his hands, produced under the extent against the defendant, his estate and effects; with liberty to retain thereout his poundage on the amount of such debt, without prejudice; and that out of the residue of the money in their hands, received under the same extent, they might apply the sum of 1,574*l.* 3*s.* 4*d.* towards satisfaction of the debt due on the extent issued at the instance of the Customs; and that they might pay the sum of 2,595*l.* 7*s.* 10*d.* being

The Court will order the residue of the proceeds arising out of an extent after the demands of the Crown have been satisfied, to be paid into Court to the credit of the cause (the Crown and Sheriff consenting) and in particular cases they will order that the amount be laid out in the purchase of Exchequer bills.

the

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the residue of the money in their hands, after deducting the said two sums to the assignee of Messrs. *Whitehead & Co.*; and that the said residue, when paid into Court, might be laid out by the Deputy Remembrancer in the purchase of Exchequer bills, to be retained by him, in trust, in this cause, and carried to an account, to be intitled, *The King v. Freame*, on the Excise extent, and be retained, subject to further order.

To this motion *Dauncey* consented, both on the part of the Crown and of the Sheriff.

But the Deputy Remembrancer objected to the course proposed of laying out the residue in Exchequer bills; both on the ground of irregularity, and the burthen of personal responsibility which would be cast on him by being made the depositary of so large and hazardous a trust in negotiable securities, and suggested that it should be invested in the Funds.

That proposal being objected to on the part of the Crown, as being a speculative mode of disposing of the money, and the motion being much pressed in consideration of the magnitude of its interest to the parties concerned;

The Court, not being able to avail themselves of any course adopted by the Court of Chancery, where emergencies of the present kind were provided for, were of opinion, that there was no mode of obviating the difficulty of the Deputy Remembrancer

brancer being under the necessity of receiving the money personally, as being the only means of getting it out of the hands of the Sheriff (which they regarded as a defect in the official appointment in that respect); and that therefore the making of the order prayed was, in the present instance, unavoidable;—cautiously guarding against the establishment of a general precedent in so doing, by making it solely in regard to the circumstances of the present case. An Order was accordingly entered,

‘That the Deputy Remembrancer should, from time to time, receive the interest and proceeds thereof, and vest the same in Exchequer bills.’

1815.
The KING
v.
FREAME.

CHURCH v. LEGEYT.

Same Day.

THE defendant had executed an agreement with the plaintiff, for the purchase of real property, and had paid in advance, as part of the purchase-money, 250*l.* but being advised that the title was defective, and having also discovered that there was an unsatisfied mortgage on the property, which had not been noticed in the abstract delivered to him, refused to complete the purchase; and the vendor (the plaintiff), not complying with his demand of making a perfect and unencumbered title to the premises, he had brought an action at law to recover the 250*l.* The Bill was filed in consequence for

The Court will not make absolute the common order nisi to dissolve an injunction (granted to restrain a purchaser from proceeding at law to recover part of the purchase-money paid by him in advance, the contract being impracticable on the ground of want of

title, and outstanding encumbrances), without the Master’s report as to the sufficiency of the title, although the objections are fully stated in the Defendant’s answer;

a specific

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a specific performance of the agreement, and an injunction as to the suit at law.

The answer admitted non-performance of the contract, and the proceedings at law, and assigned, as the cause, the want of title, and the concealed encumbrance as above.

Martin & Whitmarsh, for the defendant, now moved that the order nisi for dissolving the injunction might be made absolute.

Dawney & Girdlestone showed cause, insisting that the injunction could not be dissolved until the title had been referred to the Master.

On the other side it was urged, that the objection appearing on the record, the Court would decide on it without reference, but

The Court considered that it would be premature to send the case to a jury in its present stage; and that as sufficient ground had not been shown, they refused to dissolve the injunction, (which would be in effect deciding the cause), unless by consent, without having the Master's report.—The encumbrance, if there had been any, might have been paid off, for any thing that appeared.

Order discharged.

LAWSON

1815.

Saturday,
March 4.

Lawson v. MORGAN.

THE plaintiff had filed a bill in this Court against the defendant, who was his sole and acting partner in the trade of timber-merchants, for a dissolution of partnership, and an account to be taken of all dealings and transactions relating thereto; and that the plaintiff might be declared entitled to, and might be paid, a moiety of the profits which should appear by the account to have been made: That defendant might be restrained from accepting bills in the name of the firm, and from receiving debts due to the concern; and that a receiver might be appointed.

The prayer of the bill was grounded on the facts stated, of defendant having infringed the terms of the partnership treaty between the parties, particularly in having purchased timber to the amount of 1,000*l.* without consulting plaintiff, as by the agreement he was bound to do: of his refusal to let the plaintiff inspect the partnership accounts; and to accede to the nomination of an arbitrator to settle disputes.—The answer denied or explained the most material charges of the bill; and now

Wingfield moved for an injunction, &c. and ^{and} appointment of a receiver.

RICHARDS, Baron, suggested, that each part of this application should be the subject of distinct

The Court will not treat a bill to restrain an acting partner from collecting or creating debts, and appointing a receiver, as if it were in nature of a bill to restrain waste, whatever they might do where such partner should have been shown to have been guilty of culpable conduct, or to be insolvent.

Nor will they permit the plaintiff in aid of such a motion, to use an affidavit made and filed after the coming in of defendant's answer: though in a case analogous with that of irreparable waste, such an affidavit made and filed before answer may be used.

An application for an injunction, and the appointment of a receiver, should be made the subject of two successive motions.

X

this

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v.

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motion : the injunction, in the first instance, and the appointment of a receiver afterwards.]

An affidavit was tendered in support of the injunction (the latter part of the application being for the present abandoned), repeating the allegations of the bill, and contradicting the statements of the answer, which (by way of anticipating any objections to its being read), it was urged, might be put in at any time, and read, not only after answer, but even after a decree in support of an injunction to restrain waste ;—that the present motion was, in substance, for an injunction to restrain a partner from trading on his own account with the capital of his co-partner, and involving him in debt, which were mischiefs in the nature of waste ; in which cases such affidavits were always admissible in any stage of the proceedings.

Stephens, contra. The rule of the Court is, that where there is danger of irreparable waste a plaintiff is entitled to an injunction, on affidavit that such danger exists ; but it is contrary to rule and practice to file an affidavit against an answer put in, introducing new matter which might and ought to have been inserted in the bill. And if they are not now entitled to read their affidavit, there is here at present only mere assertion opposed to deposition.

[*GRAHAM, Baron.* If a tenant for life continue waste after answer put in to a bill filed against him by the remainder-man, for an injunction, cannot he read a supplementary affidavit ?]

In

In that case he would file an affidavit in aid of a supplemental bill, but here the same matters are deposited to which were the subject of the original bill.

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v.
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Now this is not a case of irreparable waste, or bearing any analogy to it; for *non constat* that the defendant may not do all that could be required of him; and it is no where even insinuated that he is in insolvent or even embarrassed circumstances, in which case alone could there be any pretence for the present proceeding. The partnership, in this instance, has not been dissolved; for the plaintiff has refused to consent to a dissolution: and a Court of Equity will in no case appoint a receiver and manager during the actual subsistence of a partnership concern.

THOMSON, *Chief Baron*. The principal question is, Whether the affidavit filed is admissible on the present motion. It was not made before the defendant had answered, or on the coming in of his answer, but after it had been filed; and it is now proposed to read it in opposition to that answer. I cannot consider this case analogous to that of waste. It is a bill filed to restrain the defendant from doing, what, according to the answer, he has a right to do by the agreement between them, namely, to collect the partnership debts, he being by the same agreement made liable to pay those due from the concern. It is true, that in cases of waste an affidavit, made before the answer has been filed, may be used on its coming in; but here, where there is no suggestion of the insolvency of the

defendant,

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defendant, which alone could bring this case within any analogy to those of irreparable waste, it cannot be done. The case then must be taken as it stands simply on the defendant's answer; and according to that, the plaintiff is excluded from the right to have the injunction prayed, or a receiver appointed; and therefore he can take nothing by this motion.

GRAHAM, *Baron*, concurred with the Lord Chief Baron, for the same reason, that this was not like a case of irreparable mischief; (adding) bills bearing analogy to those filed to restrain waste have certainly been acted on; but from their first introduction I have ever thought the interference of the Court a strong measure; and certainly Courts have always interposed reluctantly, conscious that by such attempts to prevent mischief they must often rather cause it.

In the present case, instead of filing a bill, and in the ordinary course sustaining it by affidavit, the plaintiff waits till he has seen the defendant's answer, and then he treats it as a bill to restrain irreparable waste, and files a supplemental affidavit, which he ought not to be permitted to read: Had it been filed before answer, it might have been used in a case of clear irreparable waste, but on the present bill and answer there is nothing shown which can induce the Court to deviate from the accustomed practice. Had bad conduct, or insolvency, been shown, it would have been materially varied. The defendant too has made a good case by his answer. It appears by the agreement that he was constituted acting partner, and was to conduct the business;

and

and how can he stir if he should be restrained from acting, and should be controlled by the appointment of a receiver? This is a mere experiment to convert a common bill into an extraordinary one. We must reject the affidavit, and rely on the answer.

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v.
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RICHARDS, *Baron*. Of the same opinion.

Motion refused, with costs*.

WOOD, *Baron*, absent on the Circuit.

* *Vid. Semmerville v. Buckler.* 3 Anstr. 658.

BOURNE *v.* BLIGH.

Same Day.

COOKE moved that publication of the depositions of a witness, taken on a bill to perpetuate testimony, might pass, (on an affidavit made by the witness's son, that his father was dead,) in order that they might be used as evidence in this cause, which was an issue directed by the Court of *King's Bench* in prohibition, and about to be tried at the approaching assizes for the County of *York*.

The motion that publication of the depositions of a witness, taken on a bill to perpetuate his testimony, may pass publication, he being since deceased, is of course.

Per Cur. This motion is perfectly of course.

RICHARDS, *Baron*. Sometimes such depositions are received and read, without a previous order to pass publication, as was done in the case of the *Berkeley Peerage* question.

END OF THE Sittings AFTER HILARY TERM.

RE REPORTS
 or
 CASES
 ARGUED AND DETERMINED
 IN THE
 COURT OF EXCHEQUER.

EASTER TERM,—55 GEO. III.

1815.

Friday,
April 14.

WESTON v. FAULKNER, *Widow.*

Subscribing witness ordered to make affidavit of the execution of an instrument attested by her, or show cause to the Court, why she should not.

A RULE having been obtained calling on *Mary Ox*, (who was stated by affidavit to have been a subscribing witness to the execution of a bond,) to show cause why she should not make affidavit of such execution; and no cause having been shown, the Court now made the

Rule absolute.

HORTON

1815.

HORTON v. MICHAEL PEAKE & SAMUEL PEAKE.

Tuesday,
April 18.

*O*WEN moved for a *istringas* against *Samuel Peake*, for not appearing to process under these circumstances: *Michael* and *Samuel Peake*, brothers, were partners in trade; *Michael* had been served with process, and another copy was, at the same time, delivered to him at his house, addressed to *Samuel*, by way of service on him also, who could not elsewhere be found, and who was said to reside most usually at his brother's house; but it also appeared by the affidavit put in to verify that fact, that he did not at that time live there. The object of the present motion was to compel the appearance of *Samuel* by means of *istringas*; and the question was, whether such a service was sufficient to authorize the plaintiff to adopt such means; and it was suggested, that otherwise the plaintiff would be driven to the necessity of proceeding to outlawry.

The Court will not grant a *istringas* against a defendant who has not been served with process, other than by delivery of it to a person at whose house he had recently resided, unless it appear that he then lived there.

A Plaintiff cannot proceed to outlawry in the Exchequer, the Court having no process on which to found such a proceeding.

THOMSON, Chief Baron. We cannot proceed to outlawry in this Court; there is no such process. The plaintiff must for that purpose institute a suit in another Court; we can do nothing in it here.

Per Curiam.

Motion refused.

1815.

Wednesday,
April 26.

POOLE v. SELWOOD.

If a cause come on for trial and be referred, and the arbitrator's award in favour of the plaintiff should be afterwards set aside, so that the cause be in consequence subsequently tried, the plaintiff, if he should also succeed on that occasion, will be allowed the costs of the former trial.

THIS cause had originally come on to be tried at the *Exeter* summer assizes, 1812, when it was referred by rule of Court, and the arbitrator made an award in favour of the plaintiff. That award was afterwards set aside, and the cause went down again, and was tried at the next spring assizes, when the plaintiff obtained a verdict.

On the taxation of costs, the master had not allowed the costs of the former trial, and *Gaselee* obtained a rule *nisi*, on showing that it was the practice of the Court of *Common Pleas*, on the authority of *Davila v. Herring* (a), and *Burchell v. Bellamy* (b), that the taxation should be reviewed.

Burrough now showed cause. The practice of the Court of *King's Bench* is, that where nothing is said about the costs of former trial, they are never allowed, which ever way the verdict may be. He cited *Mason v. Skurray* (c), *Shoobred, v. Nutt* (d), *Hankey v. Smith* (e), and *Smith v. Haile* (f), as subsequent to the case of *Burchall v. Bellamy*, which he admitted to be against him, unless overruled by those later cases, on analogy with which the Master must have acted in the present instance: and submitted, that, in principle, there was no reason in this case why either party should be fixed with

(a) 1 Str. 300. (b) 5 Bur. 2693. (c) Douglas 421
 (d) M. 23 Geo. 3. K. B. Tidd's Pr. 886.
 (e) 3 T. R. 507. (f) 6 Ib. 71.

the

the costs of the first trial, where neither appeared to be in fault.

1815.

POOLE
v.
SELWOOD.

Gaselee, on the other side, relied on the practice prevailing in the *Common Pleas*, where, if the verdict be the same way, costs are given in both trials, which, he submitted, was the more equitable rule; and the case of *Burchall v. Bellamy*, in the *King's Bench*, wherein the Court directed that the costs of a former trial, where the cause went off without the fault or contrivance of the parties (on having been referred to arbitration, in which the arbitrators had made no award), should be allowed to the party finally prevailing, as in the case of a *remanet*. Here the award which had been made was in favour of the plaintiff, who had also succeeded on the trial.—He admitted there was no case wherein the practice of this Court on such occasions had ever been settled.

THOMSON, Chief Baron. Where the Court has held the verdict of the jury wrong, the costs of the second trial depend on the order which the Court may make on the particular occasion. In the present case, as there appears to be no settled practice to the contrary, it seems most reasonable to adopt the rule of the Court of *Common Pleas*, which the Court of *King's Bench*, as it appears, have also recognized.

GRAHAM, Baron. There would have been no question about it if the cause had been a *remanet*, and this appears to be still the same cause throughout, though tried at different times, and the party failing should bear the expense from first to last.

Per Curiam.

Rule absolute.

1815.

Same Day.

PARSONS v. NIX.

If no one appears to show cause against a rule nisi for a new trial on the peremptory order day, the rule will be made absolute.

Rule absolute.

Friday,
April 21.

SMART, Gent. one, &c. v. TAYLOR, Gent.

The Court will not set aside a writ of execution issued after allowance of a writ of error served on the plaintiff, if the writ of error describe the person suing as the King's debtor, when in fact he had proceeded on a capias of privilege.

PULLER, on a former day, obtained a rule to show cause why the writ of *testatum fieri facias* issued in this cause, and all proceedings thereon, should not be set aside for irregularity, it having been issued (as appeared by the affidavit of the defendant) and executed, after a writ of error had been brought, and the allowance served on the plaintiff, previous to the taxation of costs on the inquisition. The latter part of the statement was verified by the defendant's clerk in Court, who deposed that he served the allowance on the plaintiff on the day on which the writ had been allowed, "viz. on the 10th day of February last.

Dauncey,

1815.

SMART
Gent.
one, &c.
v.
TAYLOR
Gent.

Dawney, showing cause, insisted that the writ of error was no supersedeas of the execution, as it was wholly inoperative, and had not removed this cause, inasmuch as the writ professed to remove a suit in which the plaintiff was described as *John Smart, Gent. one, &c. our debtor*; whereas, in fact, in this case, he had issued *a capias of privilege*, and had declared accordingly in his own person as a privileged officer, and not as the King's debtor. That objection alone would be fatal to the writ of error, according to the case of *Sampayo v. De Payba* (a); but there were other grounds of opposition to the rule. The 19th of *February*, the day on which the allowance was stated to have been signed and served, fell on a *Sunday*; and the writ was obviously brought solely for the purpose of delay, as would appear from a letter of the defendant, offering to give the plaintiff his bond for the amount of his demand.

In reply, it was submitted, that the day having been incorrectly fixed in the affidavit was a mere clerical mistake; and as to the tender of security, that would not go to defeat a party of his right to bring a writ of error. The present case was said to be distinguishable from that of *Sampayo v. De Payba*, where the form and nature of the action had been misrepresented in the writ of error, being trespass on the case, when it should have been covenant—a mistake not merely of the person, but of the record: it purported to remove a dif-

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SMART
Gent.
one, &c.
v.

TAYLOR
Gent.

ferent species of action which must be admitted to be objectionable; but here the alleged defect is merely in the *fictitious* character of the party suing, which is surplusage, and immaterial; but the writ of error was, notwithstanding, an efficient *super-sedeas*, and the Court could not have refused to have set up the record.

[*Wood, Baron.* They certainly could, if there were no such record—Suppose the writ had described the plaintiff as having sued *qui tam?*]

We might then have amended, as the statute (b) enables us to do; and in the case cited the Court of *Common Pleas* suspended the decision till amendment of the variance.

Thomson, Chief Baron. We cannot amend this writ, which is an original out of the Court of Chancery.

Per Cur.

Rule discharged, without costs.

(b) 5 Geo. 1. ch. 15.

LA COSTE

1815.

LA COSTE and others, v. GIRLMAN.

Friday,
May 5.

4219 373

12 Ad. & El. 664.

3 Reg 18568

THE declaration in this case stated, that by a certain indenture, &c. the defendant had assigned his interest in a policy of insurance to the plaintiff, and had therein covenanted that he would, from time to time, &c. pay to the insurance office, on or before the 10th *October*, in each year, the yearly sum of 19*l.* 5*s.* 10*d.*, in order to keep the said insurance on foot, and to prevent the same from becoming void; yet, that although said defendant ought, &c. he had not, nor would, &c.

Plea by insolvent debtor of having been discharged under 51 Geo. III. not a good plea to an action of covenant brought against defendant by the assignee of a policy of insurance, for not paying according to his covenant the annual premium for keeping the insurance on foot, which accrued due subsequently to his discharge: it not being such a sum of money payable at a future time as was contemplated by the Legislature on passing the Act.

Plea; that said plaintiffs ought not to have their aforesaid action thereof against defendant, because, &c. (pleading his discharge under the insolvent act of 51st Geo. 3, in the usual manner) and praying judgment, if plaintiffs ought to have execution for their damages by reason, &c. on or against the person of said defendant.

Demurrer; for that said sum of 19*l.* 5*s.* 10*d.* was not due or payable on the said 1st day of *May*, in the said act mentioned:—and that said plea is pleaded in bar of the said action; whereas it ought to have been pleaded in discharge of the person from execution, and also for that, &c.—Joinder in demurrer.

The

A :

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LA COSTE
and othersv.
GILLMAN.

The question on this demurrer was, Whether the sum covenanted to be paid yearly by the defendant, to keep the insurance assigned by him to the plaintiffs ~~on~~ foot, was such "a sum of money payable by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenants, or other securities of any nature whatever," according to the words of the 51 Geo. 3. (the insolvent act) as would have entitled the creditor to prove a debt equal to the value of such future payment, and to receive a dividend thereon out of the estate of the insolvent, as in the case of bankrupts.

Taddy, for the defendant, submitted, that though this was not, in fact, an annuity, it was a future annual sum payable by the defendant for the benefit of the covenantee; that it was computable in value; and would have entitled the plaintiffs to a dividend of the insolvent's estate and effects under the 49th Geo. 3, ch. 121; and that not having been so proved and valued, the defendant was entitled to be discharged from all payments subsequent to the 1st *May* 1811. But

The COURT decided that this was not such a future sum. And that the defendant was not exonerated from it by his discharge, and therefore they gave

Judgment for the Plaintiff.*

* Vide *Auriol v. Mills*, 1 T. R. 94.

FUGE v. COCKRAM.

Tuesday,
May 2.

THE plaintiff who was farmer and renter of the post-horse duties for the district comprehending the county of *Devon*, brought an action of *assumpsit* against the defendant, the proprietor of a licensed hackney coach, for duties, and a verdict was found for the plaintiff (damages 1*s.* 3*d.*) at the spring assizes for the county of *Devon*, in 1814, subject to the opinion of the Court, on the following case:

'The plaintiff, at the time of the letting of the carriage by the defendant, hereinafter mentioned, was the farmer of the post-horse duties arising within the district which comprehends the county of *Devon*, by virtue of a proper contract or lease from four of his Majesty's Commissioners of Stamps, duly authorized in that behalf.'

'The defendant, at the time of the letting of the carriage, hereinafter mentioned, resided at *Plymouth*, in the county of *Devon*, and was duly licensed by the plaintiff, under an authority given to the plaintiff by the Commissioners of Stamps, to let to hire horses for the purpose of travelling post, by the mile, and from stage to stage; and also to let to hire for a day, or any less period of time than twenty-eight successive days, horses for drawing coaches or other carriages used in travelling post,

A coach licensed under a local Act, to be used as a stage, is not protected by such license from the post-horse duties, if hired wholly by an individual to perform a journey. And the proprietor is liable to account to the farmer of those duties for one fourth of the hire if let by him to carry out and bring back, notwithstanding such hiring may be to go to and return from some place within the distance and on the road to the place specified in his license; and although he receive no greater sum than his fare would have been had he proceeded full on the usual journey as a stage.

or

1813. Edward
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Cockram; or, otherwise, and was also duly licensed by the Commissioners of Stamps to keep a hackney or, stage-coach at *Plymouth*, of which the following is, a copy:

"*Wm. Adams Welsford*, by virtue of the authority granted to me by his Majesty's Commissioners for managing the Stamp Duties, in pursuance of the statute in that case made and provided, do hereby grant license and authority unto *John Cockram* to let to hire one four-wheeled carriage, being diligence No. 19, drawn by two horses, to be employed as a public stage, to go the distance between *Plymouth* and *Plymouth Dock*, over *Stonehouse Bridge*, being two miles and back, eighteen times in every week; to carry at one time not more than four inside passengers (children in lap excepted), and not more than five outside passengers, exclusive of the coachman, but including the guard, only three of which passengers are allowed to sit on the front of the roof: Provided always, that no children in the lap, or under seven years of age, shall be included in or counted as one of such number of outside passengers, unless there shall be more than one, and if more than one, that two of such children shall be accounted equal to one grown person. And this license is to continue in force for the space of one year from the 17th day of *January*, 1813."

W. Adams Welsford

The

22. The defendant paid a weekly composition of £2. 10s. to the Commissioners of Stamps, in lieu of the stage-coach duty.

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Decr.

Decr. 1566.

‘ By an act of parliament, made and passed in the 45th year of the reign of his present Majesty, intituled, an act for the making, repairing, lighting, watching, and watering certain roads from the borough of *Plymouth* to *Stonehouse Bridge*, and *Plymouth Dock*, in the county of *Devon*, and for regulating the stands and fares of hackney coaches and carts using the same, it is enacted, that it should and might be lawful to and for the said trustees, and they were thereby authorized and empowered from time to time to license such and so many sedan chairs, hackney coaches, chaises, waggons, wains, carts, drays, carriages, as to them shall seem right and proper, to ply, or to be kept for hire, for the purpose of carrying or conveying passengers, goods, wares, and merchandise, and other matters and things, within the several parishes of *Saint Andrew* and *Charles*, in the said borough of *Plymouth*, and the parishes of *East Stonehouse* and *Stake Demarel*, in the said county of *Devon*, any thing contained in the therein recited acts, made in the 10th, 12th, and 14th years of the reign of his present Majesty, or any of them, to the contrary thereof in any wise notwithstanding.’

‘ And it is further enacted, that it should and might be lawful to and for the said trustees to demand and take, or cause to be demanded and

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1815.

For
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taken, for each and every such license, for each, and every sedan chair, hackney coach, chaise waggon, wain, cart, dray, and other carriage, the sum of 2s. 6d. and no more, which money should be paid to the clerk of the said trustees for his trouble in making out such license; and if any person or persons should, after the 29th day of September then next, ply with, or carry, or convey for hire, any passengers in any sedan chair or chairs, or any coach or coaches, chaise or chaises, or ply with, or carry or convey for hire, in any waggon, wain, cart, dray, or other carriage, any goods, wares, merchandise, or other matters or things, within the said parishes of *Saint Andrew* and *Charles*, in the borough of *Plymouth*, and *East Stonehouse*, and *Stoke Damarel* in the said county of *Devon*, or any of them, such person or persons not being so licensed by the said trustees, then and in every such case, every such person should forfeit and pay any sum not exceeding 5*l.* Provided always, that nothing therein contained shall extend, or be construed to extend, so as to require any such license to be taken for any post-coach or post-chaise employed or hired for the purpose of carrying and conveying any passenger beyond the limits or bounds of the said respective parishes, or to require any license to be taken for any waggon, wain, cart, dray, or other carriage, employed or hired for the purpose of carrying or conveying any goods, wares, or merchandise, or other matter or thing beyond the limits or bounds of the said respective parishes.'

'And it is further enacted, that it should and might

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FEB

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GEORGE IV.

might be lawful to and for the said trustees, from time to time, to appoint such stand or stands for all such hackney coaches, chaises, waggons, wains, carts, drays, and other carriages, and for the drivers thereof, respectively, to stand and ply for hire within the said several parishes, as to them the said trustees, should seem right and proper; and if any person or persons should stand and ply for hire, with any hackney coach, chaise, waggon, wain, cart, dray, or other carriage, in any other place or places than such place or places as should be so appointed as such stand or stands, then and in every such case every such person or persons so offending, should for every such offence forfeit and pay any sum not exceeding 40/- to the said trustees.

And it is further enacted, that the owner or owners of each and every such sedan chair, hackney coach, chaise, waggon, wain, cart, dray, and other carriage so licensed and used, or kept for hire, should paint, or cause to be painted, such number of numbers as the said trustees should direct or appoint, in white on a black ground, each number not being less than six inches in length, upon, or fixed, or attached to one side of each and every such sedan chair, hackney coach, chaise, waggon, wain, cart, dray, and other carriage, or upon or to such other part or parts thereof respectively, as the said trustees should direct or appoint; and if any person or persons should stand or ply with, or let for hire, within the said parishes, or any of them, any such sedan chair, hackney coach, chaise, waggon, wain, cart, dray, or other carriage, not having such number

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Rule
in
Exchequer.

or numbers so painted upon, or fixed, or attached to such hackney coach, chaise, waggon, wain, cart, or other carriage, or having such number or numbers, or any part or parts thereof, not clear and legible, every such person so offending should, for every such offence forfeit and pay any sum not exceeding 40s.

And it is further enacted, that it should and might be lawful to and for the said trustees to ascertain and affix the several rates or fares to be paid for the use or hire of every such sedan chair, hackney coach, and chaise, for carrying or conveying any passenger or passengers within the said parishes, or any of them, and also to ascertain and fix the several rates or fares to be paid for the use or hire of every such waggon, wain, cart, dray, or other carriage, for carrying or conveying goods, wares, or merchandise, and other matters and things, within the said parishes, or any of them, and from time to time to advance, lower, vary, or alter such rates or fares, or any of them, as to them the said trustees should seem right and proper; and when and as often as such rates or fares, or any of them, should be ascertained, fixed, advanced, lowered, varied, or altered by the said trustees, the same should from time to time be painted upon a table or tables, board or boards, which table or tables, board or boards, should be fixed or put up in such conspicuous place or places within the said respective parishes, as to the said trustees should seem right and proper, and such table or tables, board or boards, when so fixed or put up, should be and be deemed to be full

full and conclusive evidence of all such rates, to all persons whomsoever.

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v.

COCKRAM.

The defendant, at the time of the letting, herein-after mentioned, had a license from the trustees under the said act, for a hackney coach of the defendant's, numbered 18, to ply for hire, and to carry and convey any passengers within the several parishes in the said act mentioned.

On the 25th of January 1813, one *Philip Furze Govett* hired of the defendant the said coach, in the town of *Plymouth*, to convey him from thence to *Stoke Church*, about a mile and a half distant, and back again, both places being within the parishes in the said act mentioned and *Stoke Church*, being between *Plymouth* and *Dock*, and he was thereupon conveyed in the said coach from *Plymouth* to *Stoke Church*, and afterwards from thence back again to *Plymouth* accordingly; the defendant charged and received the sum of 5s. from said *Philip Furze Govett* for the same, the sum so charged and received not being after any certain rate per mile.

The defendant did not, in his account, afterwards rendered to the plaintiff, of the post-horse duties payable by him to, and received by him for, the plaintiff, account for the sum of 1s. 3d., being one fourth of the sum charged and received by him as aforesaid, nor hath he paid to the said farmer any duty whatsoever, in respect of the said hiring.

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FUG
v.
COCKRAM.

Gifford, in support of the verdict, submitted, that the question depended on the construction of the several Acts of Parliament as considered with reference to the Plymouth local act.

The 44th of Geo. 3. (the general stamp act) has imposed a duty of $1 \frac{1}{4}$ d. a mile for every horse used in travelling, with a special exemption in favour of horses used in licensed hackney coaches, within ten miles round the cities of *London* and *Westminster*, or the suburbs. By the 48th of the King, ch. 98, sec. 8. (the act for letting the post-horse duties to farm) persons letting horses to be used in travelling, for which they shall charge a specific sum of money, are made accountable to the farmer for one fourth of the sum so charged, in the way of duty, thereby supplying a defect in the 44th.

Under these acts the plaintiff is clearly entitled to recover in this action, unless the defendant be protected by the provisions in the *Plymouth* local hackney-coach act. The 50th of Geo. 3. ch. 48. sec. 23, expressly exempts licensed hackney coaches, lawfully used as hackney-coach stages about the metropolis and its environs, and such an exemption of those particular coaches furnishes the argument that no general exemption exists. Unless therefore the defendant be protected by the local act, or can show that this journey was one of the eighteen which he was licensed to perform by the Commissioners of Stamps, he comes within the post-horse duty acts, and is liable to account to the farmer for a fourth of the hire.

The

[The Court, having put the case of the defendant having gone the whole distance, and returned,]

1815.

FUG

COCKRAM,

It was submitted, that it would then still have been a distinct hiring for a specific sum, and therefore equally liable. The case of *The King v. Swift* (a), determined in this Court, was cited, as furnishing a decision, that a hackney coach, licensed by a local statute, being hired to travel on the public road, constitutes a letting to hire by the stage within the meaning of the act imposing a duty on horses hired for drawing carriages used in travelling post.

Bayly, for the defendant, objected, that the present proceeding went to charge the proprietor of this hackney coach, not with either duty singly, but with the two distinct duties for one and the same object, the charging which with either of those duties should necessarily discharge it from the other; and that the question ought to be, which of those duties he was liable to pay.—The duty incident on his license to ply as a stage coach, he has already paid to the Crown; but now another additional duty is sought by the farmer of the post-horse duties, under the pretended distinction of this particular journey being a letting to hire. And that creates the distinction between the present case and that of *The King v. Swift*.

The 44th of the King imposes a duty on horses let to hire. Subsequent statutes impose a duty on coaches carrying passengers. Here the defendant

(a) 8 East 584 (in nomine).

1815.

FUG
v.
COKRAM.

(as he was entitled to do) carried a passenger, who took the whole coach, paying the amount of the whole fare for the whole distance, and for returning the fare to *Plymouth Dock* being 2*s. 6d.* And in that he was protected by his license "for a coach used for the purpose of carrying passengers for hire." Those are the words of the act of 25 *Geo. 3.* c. 51, sec. 45, and also of this case; but then he stops at *Stoke Church*, short of the distance which he was allowed by his license to go, and returns with his fare before he has proceeded to *Plymouth Dock*. Now *Stoke Church* is in the usual road to *Plymouth Dock*, and if he might have gone the whole way under the protection of his license *a fortiori* might he have gone a less distance on the same route, *quod omnis magis consinet in ece minus.* As to the defendant being called on to prove that this journey was one of those which it was permitted him to perform under his license, it is, on the contrary, incumbent on the plaintiff to show that it was not; but if it were not, or if the defendant's coach had not been so licensed, the duty to which he would have been liable would be that on stage coaches, by the express enactment of the 53d *Geo. 3.* ch. 108, sec. 21, and not that on horses let to hire for drawing carriages travelling post.

In reply, it was urged that the defendant had in this instance used his coach, not as a stage, according to his license, but as a hackney coach, for which he was not licensed, and if he was called on to pay two duties it was because he had used his coach in a double employ. That in the 49th

sec.

sec. of ch. 51. of the 25th George 3d. (which had been alluded to) it would be found that the particular places whence and where such coaches are authorized to go, and the number of miles between such places shall be expressed and inserted in the license. In this instance, the defendant's coach was hired off the stand, and did not go as a stage, but as a hackney coach.

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Ptes.

v.

Cocktail.

Cur. adv. guilty.

Monday,
May 8.

Thomson, Chief Baron. The question for the opinion of the Court is, whether in this case the defendant is protected by his stage coach license from accounting to the farmer of the post-horse duties for one fourth of the sum received by him, as the fare for the journey which has given rise to the present action: [here his Lordship recapitulated the facts of the case.]

Now it appears that the defendant let his coach on the occasion in question, to *Gorett*, to go from *Plymouth* to *Stoke*, and to bring him back again: And although that place be on the road, within the distance for which he was licensed, on particular occasions, to use it as a stage coach; yet taking all the circumstances of this case into consideration, we are of opinion that by such extraordinary letting, having carried him to *Stoke Church* and brought him back again, without having gone his stage, he falls within the provision of the act respecting the post-horse duties; and that he thereby became liable to account to the person farming those duties, for one fourth of the sum received by him for

1815. for that journey. We therefore think the verdict for the plaintiff for 1 s. 3 d. is right, and must stand.

vs.
COCKRAM.

Postea to the Plaintiff.

Same Day.

CAVENAGH and others *v.* SUCH.

A parcel delivered to the guard of a mail-coach, and by him to the porter of the inn where the mail stops, whose business it is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for carriage, does not make such porter personally responsible for its loss.

THIS was an action on the case, to recover the value of a parcel of notes, charged to have been lost by the defendant, to whom it had been intrusted for delivery at the place of its address. The plaintiffs declared against him as a common porter of goods, &c. for hire, from a certain inn called the *Lamb*, to the houses and abodes of the persons to whom such goods, &c., brought by the *Bristol* mail, might be directed;—the first count of the declaration charged the defendant, as such porter, with receiving the parcel, on an undertaking to deliver it safely at the banking-house of the plaintiffs, where it was directed;—the second count charged a similar undertaking for a certain reasonable reward;—the third count was on the plaintiffs causing the parcel to be delivered to the defendant, to be secundarily kept by him, and re-delivered to the plaintiffs at their request;—the fourth count, trover.

The cause was tried at the *Bristol* Session Assizes, 1812.—Verdict for the plaintiff, with liberty to move to enter a nonsuit, if the Court should decide

decide in favour of the defendant, on the following case;

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CAVENAGH
and othersv.
SUCR.

The plaintiffs are in partnership together, as bankers. They have a house of business at *Bristol*, and another at *Bath*. On *Friday*, the 4th of *December* 1812, a parcel, containing a bill of exchange for 50*l.*, and promissory notes for 230*l.*, the property of the plaintiffs, (and which parcel was directed for the plaintiffs, at their banking house at *Bath*), was delivered at *Bristol* by the plaintiff clerk, to one *Rich. Bettsworth*, the guard of the *Bristol* mail coach, to be carried from *Bristol* to *Bath*. The guard of the mail-coach is the servant of and appointed by the post-office, and has nothing to do with the proprietors of the coach; neither has he the care, nor does he intermeddle with the parcels ordinarily sent by the coach. The defendant was head porter at the *Lamb Inn*, in *Bath*, at which house the *Bristol* mail-coach stops; and, as such porter, he has the charge of all the parcels brought to the coach-office, there to be delivered at *Bath*; and it is his business, as such porter, to deliver such parcels to the different persons at *Bath*, for whom they are directed. The course of business is, when a coach arrives, the parcels brought by it are taken into the coach-office, checked, and marked off from the way-bill, and copied into a book, and then left in the office, to be taken out by the porter. The porter receives 1*d.* for every 3*d.* paid for portage of any parcel, the remainder is the profit of the proprietors of the *Lamb Inn*, for booking. In this way, and for putting

1815.

CAVENAGH
and others

Sect.

putting passengers' luggage into the coach, the defendant was remunerated for his services. The defendant had, in his employ as under porter, one *Minty*, who was hired, and also paid by defendant for his services. The parcel in question was carried by *Bettsworth* from *Bristol* to the *Lamb Inn*, at *Bath*, where he delivered it to *Minty*, and informed *Minty* it was a bank parcel, and therefore desired it might be immediately delivered; *Minty* took the parcel to the coach-office of the *Lamb Inn*, and informed his master, the defendant, that *Bettsworth* brought it, and said it was a valuable parcel, when the defendant himself marked upon it 8*l.*, as the sum to be received from the plaintiff, for its delivery; and after so doing the defendant placed it under the window of the coach-office, telling *Minty* not to take that parcel, as it was a valuable one, and he feared he might lose it. *Minty* then took and delivered the other parcels, as was his usual duty; the parcel in question, when he left the coach-office, he saw lying under the window in the office. The parcel never was delivered to the plaintiff; but after it was so placed under the window of the coach-office was lost. Previously to and at the time the parcel was so received at the *Lamb Inn*, and afterwards lost as aforesaid, there was a public notice hung up in the coach-office, that the said proprietors would not be answerable for the porters of the office. The proprietors had since discontinued such notice, but it was up at the time of the loss in question.

There was also hung up there another public notice,

notice, that the proprietors of the coach would not be answerable for parcels above the value of 5/- unless entered and paid for as such.'

1815.
CAVENAGH
and others

SUCH.
Tuesday,
May 2.

Gifford, for the plaintiffs. The general rule is, that a person receiving a parcel to be carried for reward, is liable to his employer in the event of its loss: but the ground of exemption meant to be relied on, in this case, is, that the defendant was the servant, for that purpose, of other persons, against whom it will be contended that this action should have been brought. Those persons are the proprietors of the coach; but they are not responsible in this case, inasmuch as the parcel which has been lost, was never delivered to them in charge, to be carried, nor was at any time under their control or in their custody; for the guard, to whom it was intrusted, was not the servant of the proprietors, but of the post-office: nor was the porter, to whom he delivered it, their servant, for the purpose of carrying this parcel, but an individual acting independently and of himself, receiving a remuneration for his trouble, and therefore responsible, however small that remuneration, *Coggs v. Bernard* (a). To authorize the distinction taken in this case between the porter and those who were said to be his employers, that part of the case of *Whitfield v. Lord Le Despenser* (b) was cited; where Lord Mansfield distinguished the postmaster from the person receiving a penny to carry letters to the post-office, and from the sorter acting in the

(a) *Id. Raym.* 909.

(b) *Cowper* 765.

business

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and othersv.
SUC.

business of his department, both of which latter were held to be liable for losses, although the former was not; and in *Middleton v. Fowler* (6), the plaintiff, who had brought an action for the loss of his luggage as a passenger, against the master, and not against the coachman, was nonsuited; the latter, at that time of day, not being the servant of the former for the purpose of carrying goods as well as persons, the conveyance of luggage being then an accommodation customarily paid for beyond the passenger's fare. It is also a material fact in this case, that there was a notice in the coach office, that the proprietors of the inn would not be answerable for the conduct of the porters.

Thomson, *Chief Baron*, suggested that the bailment to the guard might not have been completely at an end till the actual delivery of the parcel at the place of its destination, and whether, in that case, the porter might not be regarded as the servant of the guard.

Williams, *C. F.*, *contra*, contended that the parcel had never been in the custody of the present defendant, for the purpose of carriage, and that if it had, it was only in his custody, either as a servant of the proprietors of the coach, or of the master of the *Lamb Inn*, and that therefore this action could only be maintained against one or the other of those parties—that a delivery to the guard was nothing more than a delivery to the coach by his hand as much as a delivery to any outside pas-

(c) 1 *Salk.* 282.

senger,

seager, for the purpose of handing it to the coachman would have been, or it would have been a fraud on the proprietors, on his part, as of course neither coach or horses belonged to him. But, in fact, the parcel was ultimately deposited in the coach-office at the *Lamb Inn*, where *Suck*, as the porter of that office, marked it with the rate of carriage to be charged as a parcel brought by their coach; and that established a sufficient custody on the part of the proprietors of the coach, to fix them with responsibility for its safe delivery. The case of *Hyde v. The Trent & Mersey Navigation Company* (d), goes to continue the responsibility of carriers to the door of the address to which goods are destined; for a coach cannot go from house to house; nor should a bairl be necessarily considered as contracting with every subordinate person in the employ of the carrier. *Boller J.* said, in that case, "The carrier is bound to deliver the goods, and "the person who actually delivers them acts as the "servant of the carrier." It is a fair criterion of the situation of the porter in this case, that he received only one third of the portage charged, and that he accounted for the remaining two thirds to the landlord of the inn; and that is a decisive test of the nature and of the fact of his employment. It proves him to have been there in a different situation from that of a common independent porter, whose services any one might engage, and that he was merely the porter of the inn, in attendance at the office, for the service of the coach; receiving for that service a rateable compensation as fixed by his employers.

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CAVENAGH
and others" " "
Suck.

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CAVENAGH
and others

Suck.

The cases cited do not apply to the distinction attempted to be made in the present instance. As to the case of *Middleton v. Fowler*, in those days the duties of a stage-coach proprietor were more limited than at present. It will not be contended that the stage-coach proprietor would not now be held liable for the loss of parcels received by the coachman, to carry according to their address. *Clark v. Gray*, 4 Esp. N. P. C. 177, shows that the proprietor is answerable for luggage received by the coachman, to be carried, although the owner be a passenger at the time. There are other cases to the same point. All that was decided in the case of *Coggs v. Bernard*, was, that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration; and the only difference was, that a common carrier was obliged to undertake the carriage of goods, and a private person was not. With regard to the disavowal by the proprietors of their responsibility for the acts of their porters, it is in law a mere nullity; they might as well disavow their liability for the misconduct of their coachmen.

Gifford replied, that as to the porter being the servant of the guard, *Suck and Bettesworth* might certainly unite in the contract for safe delivery, and it would be competent to the plaintiff to adopt that joint engagement. The terms of the case fully satisfy the second count in the declaration, which does not charge the defendant in any special character, but goes on the naked delivery to carry for reward. If a person

a person engage even a porter at an inn to carry a parcel, that does not make the landlord liable for its loss.¹³ Nor could the master of the *Lamb Inn* have maintained an action for the portage of this parcel if it had been duly delivered. Admitting the notice of not being answerable for the porters to be a reality, it at least shows the understanding which subsisted between them and the proprietors.

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CAVENAGH
and others
SUCH.

Thomson, Chief Baron. The single question is, whether the defendant is liable to account to the plaintiff for the loss of this valuable parcel. [His Lordship then stated the case]. It is expressly found, that the defendant, as porter, had the charge of all parcels sent by the coach, and was the agent of the proprietors for the purpose of their delivery to the places whither they were directed. Although this parcel might not have been marked off from the way-bill, that does not exclude the fact of its being entered in the books of the office as a parcel sent by the coach, and to be taken out for delivery by the porter. Then his remuneration for that duty is small, a proportion of only one third of the portage, the remainder belonging to the proprietor of the *Lamb Inn*, who (though it is not so stated in the case) is said to be one of the proprietors of the coach. The parcel is found to have been in the coach-office, and to have been marked off, but whether the 8 d. was for carriage or portage, or both, two thirds were either way to be deducted, whether as the share of the proprietors or of the landlord. It seems, the parcel was lost while resting in the office. Now it becomes

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necessary to consider in what character the defendant stood, and what was the nature of the ~~con-~~tract. There was certainly no personal contract on the part of the plaintiffs with the defendant; but this is a parcel brought by the coach, and deposited in the office in the common course, and therefore, without saying where any responsibility attaches, it seems to me to be impossible to maintain the present action on the ground of a contract with this defendant. And even supposing that the notice discharged the proprietors, that would not cast the liability on the porter.—On the facts of this case then I think we should order the *process* to the defendant, and that a nonsuit be entered.

Graham. The plaintiffs must have contracted with one of three sets of persons; first, with the proprietors of the coach, and they are exempt by the now legal notice, of which they availed themselves. Next with the proprietors of the inn, against whom the hardship would be great, as the loss was not attributable to them. The last forlorn experiment is made against the porter. Now he is a dependent character, and in the service of one or both, and therefore not a common carrier to whom the goods were bailed, but the servant of a carrier, receiving one third of the charges for portage as a remuneration for his services, and therefore clearly not responsible.

Wood, Baron. I am of opinion that the present action cannot be maintained against this defendant; whether it is maintainable against any body, I do not say; I have however great doubts on that point.

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The first question is, What was his character in the transaction? It is admitted, that where a carrier's servant loses goods, the action should not be against him, but against the master. Now I understand the defendant, in this case, to be in the situation of a servant or porter to the proprietor of the inn, whose business it was to deliver the parcels sent by the coach; for that service he was to receive 1*d.* in 3*d.*, and the other 2*d.* was to be received by the proprietor of the inn; so that the proprietor, in fact, receives the money, and out of it allows that proportion in the nature of a rate of wages. The defendant therefore acted merely as servant of the proprietor; and if any action be maintainable at all, in this case, it should have been brought against the proprietor of the inn, according to Mr. Gifford's argument; but I give no opinion on that part of the case.—It is said, the master of the inn could not support an action for the portage, but that I much doubt. On the whole, I am of opinion that the plaintiff should be nonsuited.

RICHARDS, *Baron.* I entirely concur, because it is impossible not to say that the porter is merely a servant in this case, and therefore not responsible.

Postea to the defendant.

*Saturday,
May 6.*

The KING *v.* the Sheriffs of LONDON,

in a cause of

PARLETT *v.* BARNETT.

In affidavits to be read, it must appear by the *jurat* that all the deponents have been sworn.

A defendant may be rendered during the whole of the day on which the rule to bring in the body expires.

The render is not complete or effectual till notice served.

The Court will set aside an attachment against the Sheriff, on payment of costs, if the defendant has been rendered on the evening of the last day of the rule,

and notice be given early next morning.

OWEN, on the part of the plaintiff, showed cause against a rule *nisi*, which had been obtained by *Campbell* on a former day, to set aside an order for an attachment to be issued against the Sheriffs of *London*, for not bringing in the body of the defendant pursuant to rule, on the ground of irregularity.

He first took a preliminary objection to the affidavit made in support of the application for the present rule, which was, that though the affidavit was made by two persons, it was not expressed in the *jurat* that both the deponents had been sworn*; and that in the *King's Bench*, according to the rule of Court, it was necessary that the names of the deponents sworn should be expressed in the *jurat*.

It was answered, that the present affidavit having

* The affidavit was signed by both deponents, but the *jurat* was merely, "Sworn at my house in Guildford Street, this 1st day of May 1815, before me. R. Graham."

been

been sworn before a Baron, the Court would presume it to have been complete;—that it was not required by the practice of this Court that the deponents should be expressly named in the *jurat*, nor was it usually done*; but, by

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Thomson, Chief Baron. An answer so sworn would certainly not be received; whatever the practice may have hitherto been, it would be an useful and proper regulation that all the deponents should be stated to have been sworn. Let it be considered a rule therefore, in future, that it must appear by the *jurat* of every affidavit, that it has been sworn by all the deponents.

Owen then proceeded to show, that the attachment had been regularly obtained. He stated, that the Sheriffs had been ruled to bring in the body on the 24th of *April*, and that that rule expired on the 28th, which brought the Sheriff into contempt, on the rising of the Court on that day; that the defendant was not rendered till the evening of the 28th, when the instructions for attachment must have been prepared, which was moved for and obtained at the sitting of the Court on the morning of the 29th; and, that no notice had been given of the surrender till the 29th; which, by analogy with the justification of bail, being incomplete till the rule for allowance be served, *Rex v. Sheriff of Middlesex* (a) could not be deemed a

* And so certified by the Deputy Clerk of the Pleas.

(a) 4 T. R. 493.

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perfect render*: And that at all events the attachment having been obtained, the defendant could not be allowed to make the present motion with effect till the costs had been tendered, according to the case of the King *v.* the Sheriff of Middlesex (b).

Campbell, on the other side, submitted, that the defendant had the whole of the 28th to surrender; and that the notice was served as early as ten minutes past ten in the morning of the 29th, as appeared by the affidavits; and that an offer was then made to pay the costs of the attachment, and refused.

Per Curiam.

Rule absolute, on payment of costs of the attachment, and of showing cause.

* The Master being referred to, reported, that a surrender was not complete till notice given.

(b) 1 Taunton 56.

KING

KING v. PRICE.

Saturday,
May 6.

OWEN had obtained a rule, calling upon an attorney in the country, to show cause why he should not pay to the plaintiff a sum of money which he had received for him, from the defendant in the above cause; and why he should not pay the costs of that application, and answer the matters of the affidavit on which it was founded; and no cause being shown, the rule was made absolute on affidavit of service.

The plaintiff having got the costs taxed, made a personal demand on the attorney, in due course, of the sum and costs, and neither being paid,

On motion for an attachment for not paying money under a previous order of the Court, on a party who has been called on by the former rule to show cause why that money and the costs of such application should not be paid, and against which order no cause has been shown: the rule for the attachment will be granted absolutely in the first instance.

Owen now moved for an attachment against him, and submitted, that he was entitled to move for it absolutely in the first instance; and that the attorney, under such circumstances, ought not to have the indulgence of a rule to show cause; for although he admitted, that in general where an attachment is moved for, for non-performance of an order of the Court, in all cases, except for non-payment of costs under the Master's *allocatur*, it should be through the medium of a rule to show cause, as was held in *Chant v. Smart* (a): yet in this case

(a) 1 B. and P. 477.

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the attorney had already had full opportunity to do so under the original rule, when he ought to have given any reason which he might have had, for not complying with that rule; but having shown none, the Court would conclude that he could not show sufficient cause; and being ordered by the rule to pay the money, in the event of his not doing so, the Court would go as far in enforcing obedience to their own order, as they would in support of the authority of the Master's *allocatur*, in which case it was the constant practice to make the rule absolute in the first instance. He moved, therefore, that they would do so here on the non-payment of the money ordered to be paid by the rule, after having been regularly demanded, although it was coupled with the non-payment of costs, in pursuance of the Master's *allocatur*.

The COURT admitted the propriety of the application, and made the

Rule absolute in the first instance (b).

(b) *Vid. Gifford v. Gifford, Forrest's Exch. C. 80*, where the Master certified to the Court, that when an attachment is moved for on non-payment of costs, pursuant to an award and *allocatur*, there must be a rule to show cause. *Timmings v. Blatherwick*, (there cited) T. 40 Geo. 3.

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RUSHFORTH v. BEATSON and others,
DYSON v. same.

Monday,
May 8.

THIS action was brought in *December, 1814*, by the plaintiff, who was in the woollen trade, in the parish of *Halifax*, against the chief constables and two other of the inhabitants of the hundred of *Agbrigg and Morley*, in the *West Riding* of the county of *York*, for the recovery of 86*l. 6s. 8d.* for damage done to his mill by the rioters in 1812, under the provisions of the statutes*.

The clause of limitation of actions given against the hundred by the hue and cry act, 27 *Eliz.* ch. 13, for the purpose of indemnifying the party robbed, held not to have been adopted by the riot act, 1st *Geo. 1.* ch. 5, and the subsequent statutes, as a necessary consequence of their reference to the 27 *Eliz.* and that the words "in such manner, &c." are confined to the mode of reimbursing the person damaged on the recovery of damages.

The following abstract of the several statutes may serve to elucidate this case. The 27 *Elizabeth*, ch. 13, referred to by the subsequent acts, extends the provisions of the earlier statutes of hue and cry, for indemnifying the party robbed—provides for the reimbursement of the inhabitants of hundreds sued for damages, by contributory taxation and levy on the other inhabitants, and limits the period within which the action against the hundred shall be brought, to one year after the robbery committed. By the 1st *GEO. 1. stat. 2. ch. 5. sec. 4.* (the riot act) it is enacted, that persons unlawfully, &c. assembling and demolishing, or pulling down or beginning to demolish or pull down, any church or chapel, or any dwelling-house, barn, stable, or other outhouse, shall be adjudged guilty of felony, without benefit of clergy; and by sec. 6, an action is given to the party damaged by such persons to recover damages against any two or more of the inhabitants of the hundred wherein, &c. to be raised and levied on the inhabitants of such hundred, and paid to such plaintiff in such manner and form, and by such ways and means, as are mill, or were independent of it, forms a question for the jury, whose finding will be conclusive of that fact.

In the case of the demolition of the works of mills, the determining whether the works destroyed belonged to the provided

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RUSHFORTH

v.

BEATSON

and others,

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same.

The declaration contained six counts: the three first were founded on the statute of the 41st. *Geo. 3.* ch. 24, and stated, that after, &c. to wit, on, &c. at, &c. divers persons, to the number of twelve and more, being then and there unlawfully, tumultuously, and riotously assembled together, to the disturbance of the public peace, did unlawfully, tumultuously, and with force, demolish in part a certain water-mill of said plaintiff, situate, &c. to wit, the walls, doors, windows, window-frames, locks, and hasps, affixed and belonging thereto, and part of the said water-mill of the said plaintiff, and certain works, to wit, certain shears, frames, machines, and straps, to wit, twenty, &c. &c. of the said

provided by the 27 *Eliz.* for reimbursing the person or persons on whom any money recovered against any hundred by any party robbed shall be levied. The 8th section limits the time for prosecuting offenders to one year. The 9th *Geo. 3.* ch. 29, to obviate doubts as to the riot act extending to the demolition of mills, enacts that the demolishing, or beginning to demolish, &c. any mill, shall also be felony; limiting the prosecution to eighteen months from the time of the offence; but that act not having given the party damaged by such demolition any remedy by action against the hundred, the 41st *Geo. 3.* ch. 24, was passed to supply that omission; and by that act, the same power to sue for and recover damages against the hundred, is given to the person or persons damaged by the demolishing or beginning to demolish any mill, as was given in the cases enumerated in the 1st *Geo. 1.*, and the same mode of reimbursing the person sued. The last statute 52 *Geo. 2.* declares that the burning or demolishing, wholly or in part, any building or erection employed in carrying on any trade or manufactory of goods, or in which goods shall be warehoused or deposited, shall be guilty of felony, gives damages to the party injured, by reference to the 1 *Geo. 1.*, and limits the suit for such damages to a year.

plaintiff,

plaintiff, belonging to the said water-mill, of great value, to wit, &c. in contempt, &c. to the great damage, &c. and against the form, &c. whereof said defendants, who then were and still are four of the inhabitants of said hundred, afterwards, to wit, &c. had notice whereby, and by force, &c. an action has accrued to plaintiff, being the party injured and damnified thereby, to recover against the defendants, being, &c. his damages, by him sustained, by demolishing in part the said water-mill, and the works thereto belonging;—the third for demolishing the works only;—the fourth, on 1st Geo. 1. ch. 5, for unlawfully, feloniously, and with force, demolishing a certain outhouse of plaintiff, situate, &c. and adjoining to a certain dwelling-house of said plaintiff, and used and occupied therewith;—the fifth, on the same statute, for the demolition of part of a certain other outhouse, adjoining to a certain other dwelling-house of said plaintiff, and used and occupied therewith, to wit, the walls, doors, &c. together with divers goods and chattels of said plaintiff, to wit, ten shears, &c.;—the sixth count, on the same, for demolishing a certain other outhouse, &c. omitting “adjoining, “ &c.” and the walls, &c.—Plea, the general issue.

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RUSHFORTH

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and others,

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same.

Topping had obtained a rule *nisi* for a new trial, contending, that to bring the case within the 41st Geo. 3, the acts which occasioned the damage to the plaintiff, should have been laid to have been feloniously committed. He further objected, that the frames, shears, and other machinery destroyed, formed no part of, nor in point of law could be said to

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to have belonged to the plaintiff's mill, which it was incumbent on the plaintiff to prove most satisfactorily, to entitle him to recover damages from the hundred under the statute, no part of the building or mill itself having been demolished or pulled down by the rioters, whose violence was solely directed against the machinery; and he finally mainly insisted, that the statutes on which the action was founded had limited the period within which the suit must be commenced, to the term of a year from the time of the damage having been sustained; the first of *Geo. 1.*, had done so by express reference to the 27 *Eliz.**, in which the clause

* And be it further enacted by the authority aforesaid, That if after the said last day of *July* one thousand seven hundred and fifteen, any such church or chapel, or any such building for religious worship, or any such dwelling-house, barn, stable, or other out-house, shall be demolished or pulled down, wholly, or in part, by any persons so unlawfully, riotously and tumultuously assembled; that then, in case such church, chapel, building for religious worship, dwelling-house, barn, stable or out-house, shall be out of any city or town, that is either a county of itself, or is not within any hundred, that then the inhabitants of the hundred in which such damage shall be done, shall be liable to yield damages to the person or persons injured and damnified by such demolishing or pulling down wholly or in part; and such damages shall and may be recovered by action to be brought in any of his Majesty's courts of record at *Westminster*, (wherein no essoin, protection, or wager of law, or any imparlance) shall be allowed) by the person or persons damnified thereby, against any two or more of the inhabitants of such hundred, such action for damages to any church or chapel to be brought in the name of the rector, vicar or curate of such church or chapel

clause of limitation of the action against the hundred is first enacted; and that the subsequent statutes had adopted that clause by uniform and constant reference to the 1 Geo. 1, which construction was consistent with justice, and the object and policy of those statutes.

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chapel that shall be so damnified, in trust, for applying the damages to be recovered in rebuilding or repairing such church or chapel; and that judgment being given for the plaintiff or plaintiffs in such action, the damages so to be recovered shall, at the request of such plaintiff or plaintiffs, his or their executors or administrators, be raised and levied on the inhabitants of such hundred, and paid to such plaintiff or plaintiffs, in such manner and form, and by such ways and means, as are provided by the statute made in the seven and twentieth year of the reign of Queen *Elizabeth*, for reimbursing the person or persons on whom any money recovered against any hundred by any party robbed, shall be levied: and in case any such church, chapel, building for religious worship, dwelling-house, barn, stable or out-house so damnified, shall be in any city or town that is either a county of itself, or is not within any hundred, that then such damages shall and may be recovered by action to be brought in manner aforesaid (wherein no essoin, protection, or wager of law, or any imparlance, shall be allowed) against two or more inhabitants of such city or town; and judgment being given for the plaintiff or plaintiffs in such action, the damages so to be recovered shall, at the request of such plaintiff or plaintiffs, his or their executors or administrators, made to the justices of the peace of such city or town at any quarter-sessions to be holden for the said city or town, be raised and levied on the inhabitants of such city or town, and paid to such plaintiff or plaintiffs, in such manner and form, and by such ways and means, as are provided by the said statute made in the seven and twentieth year of the reign of Queen *Elizabeth*, for reimbursing the person or persons on whom any money recovered against any hundred by any party robbed, shall be levied.

the

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v.

same.

Parke and *Richardson* now showed cause against the rule.—The objection of the damage not having been laid to have been done feloniously, they argued, should have been made (if there were any thing in it) the subject of a motion in arrest of judgment, but was no ground for obtaining a new trial. Then they insisted, that the determination of the question, Whether the machinery which had been destroyed formed part of the works of the mill, was the province of the Jury who tried the cause, and whom the Judge had considered, from their local knowledge, fully competent to decide that point; and their decision, therefore, must now be held to be conclusive. Then the most important question, of Whether there be any limitation of time for the bringing actions against the hundred for the injury done, remains to be considered. Now there is certainly no such limitation expressed in any of the Acts on which the present proceeding is founded: The prosecution of offenders, indeed, is expressly limited; and that affords an argument, that it was not the intention of the Legislature to restrict the bringing actions, or that would also have been provided for. Then it becomes an object of inquiry, Whether the slight and partial reference to the 27 *Eliz.* in the 1st *Geo.* 1, adopts the clause of limitation contained in that act. On the trial, Mr. Justice *Le Blanc*, when that objection was taken, expressed himself to be of a contrary opinion, and overruled the objection, holding that the reference did not reach the clause of limitation.

It

It was said, that the same opinion had been held by Mr. Justice *Buller*, in a cause tried before him at the Summer Assizes for the county of *Surry*, in 1797. That case was an action against the hundred, for damages by the destruction of some houses in the Borough; and on the objection being taken, that the plaintiff was barred by the statutory limitation, his lordship ruled that the limitation related only to the prosecution of offenders criminally*.

Topping,

* *MARRIOTT v. COOKE and another.*

The plaintiff had brought an action against two of the inhabitants of the town and borough of *Southwark*, to recover damages under the riot act, 1 Geo. 1. st. 2. c. 5, for the demolition of his house, which was stated in the declaration to be a certain dwelling-house of the said *S. M.* This action was tried before Mr. Baron *Hotham*, at the Summer Assizes for *Surry*, 1796, when the House appearing to have been not in the possession of the plaintiff, but of another person, the Judge directed a nonsuit; and on motion made next term, (Mich. 37 Geo. 3.) to set aside the nonsuit, and grant a new trial, the Court of C. P. refused a rule; *Buller*, J. saying, that if the interest in the house was special, it ought to have been specially stated.

The plaintiff afterwards (Tr. 37 G. 3.) commenced another action for the same damage against two other inhabitants of the town and borough, which came on to be tried before *Buller*, J. at the Summer Assizes for *Surry*, 1797.—The Defendant's Counsel objected that the action was commenced too late, as the 8th section of the statute provides, “that “no person or persons shall be prosecuted by virtue of “that Act, for any offence or offences committed contrary “to the same, unless such prosecution be commenced within “twelve months after the offence committed.”

But

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and others,
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v.

same.

Topping, in reply, in addition to what had been urged on the former occasion, contended, that all the statutes on the subject matter being in *pari materia*, should be taken together, as constituting an entire and general law; and that the reference to the 27 *Eliz.* by the riot act, was not slight and partial, but general and comprehensive; the words of the sixth section, of that act "in such manner "and form, and by such ways and means as are "provided by the 27 *Eliz.*" being applicable to every part of the context of that section, and embracing every provision adopted by that section, in common with the 27 *Eliz.* That the question of the damaged machinery being part of the works of the mill, was for the consideration of the Court, as depending on the construction of an act of parliament on the facts adduced in evidence, and should not have been left to the Jury. He submitted, that the damages recoverable were *in nomine paucæ*, and as such, the suit should be limited to some precise period, lest the party sued should be deprived of his means of defence by the lapse of time, and the changes incident to the inhabitancy of the hundred, composed, of course, of a fluctuating body: and lest the burthen should fall on persons who at the time when the mischief was committed formed no part of the hundred, which might, at the time of the

But *Buller*, J. was clearly of opinion that this section imposed no limitation on actions, but only on criminal prosecutions. He said the defendants on the record had committed no offence contrary to the Act.

The plaintiff therefore obtained a verdict.

action

action brought, consist of persons who had not then resided there, while those who were at that time actually dwelling in the hundred might have removed elsewhere:—that the object and effect of the Acts warranted such a construction; and that it never could have been intended by the Legislature that the prosecution for the offence should be strictly limited, while the action given to recover damages from the hundred were illimitable. That such a construction as would assume the adoption of the clause of limitation to have been in contemplation of the Legislature, was further confirmed by the 52 Geo. 3. ch. 130; that statute declaring that the persons firing or demolishing any erection or building, used in any trade, or manufactory of goods, wares, and merchandises, or in which any goods, &c. shall be warehoused or deposited, shall be adjudged felons; and supplies to the party damaged the same means of reimbursement as are provided by the 1st Geo. 1; but at the same time expressly confines the suit to a year after the offence committed.

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v.

same.

Cur. adv. vult.

THOMSON, *Chief Baron.* In our consideration of this case we have looked with much diligence into all the several statutes on the subject; and our opinion resulting from that investigation is, that the clause of limitation of the period within which the remedial proceedings against the hundred are limited to be commenced by the 27 Eliz. ch. 13, is not adopted by the 1st Geo. 1. ch. 5, nor consequently by any of the subsequent statutes; and that

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A A

there

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there is therefore no restriction now in force, as to the time of bringing the action, on parties entitled to the benefit of the indemnifying provisions of the later acts. The reference to the 27th *Eliz.* introduced in the riot-act, and to the riot-act in the succeeding statutes, we are of opinion is confined to the mode of raising and levying the damages recovered in the action against the hundred.

On the other point, the Court considers the question, of the machinery being part of the works of the mill, as having been properly left to the Jury, who must from local knowledge be presumed to be competent judges of that fact, and that their decision is conclusive. I take it for granted, that the machinery was set in motion and worked by the operation of the mill. Our judgment, therefore, is, that both rules should be discharged.

Per Curiam.

Rules discharged.

Dox

1815.

DOE *ex dem.* CRUTCHFIELD and others v. PEARCE.Monday,
May 8.

A VERDICT was found for the plaintiff (whose lessors were the trustee and devisees of the heir at law), in this ejectment, which had been brought against the devisee of *Richard Pearce*, (who was devisee of the original testator) and tried at the Lammas assizes for the county of *Northampton* in 1814, subject to the opinion of the Court on the following case:

A devise (introduced by the words "I do give " and dispose " of all my " worldly " goods," and preceded by a devise immediately following those words of a manor and lands) of "the " perpetual " advowson of " Husband's " Barworth, in " Leicester- " shire, and " my manor " of *Starwick*, " and all my " lands in " Northamp- " tonsire," held not suffi- " cient to carry a fee in the lands in North- " amptonsire, to a devisee, who was one of three residuary legatees, for want of words of inheritance or perpetuity; and that he only took an

" *Richard Pearce*, Esquire, being seised in his demesne, as of fee, in the advowson of *Husband's Bosworth*, in *Leicestershire*, and the manor, lands, tenements, and hereditaments sought to be recovered by this action of ejectment, made his last will and testament in writing, duly executed and attested, for passing real estates, in these words; " In the name of God, Amen. I, *Richard Pearce*, " of the parish of *St. John's, Westminster*, do give " and dispose of all my worldly goods it hath " pleased God to bless me with, as follows: I give " to my son *Thomas*, the manor of *Flamstead*, " and all my lands in that parish, and *Martin's Farm* that is in the parish of *Redburn*; and all " rents that shall be due at my death; but if no " child born in wedlock, then I do give the above

estate for life in the lands so devised, the Court giving no opinion as to what estate he took in the advowson, holding, that even if he had taken a fee therein, it would not have altered or extended the effect of the subsequent devise of the lands; but that the rule of law must prevail against the apparent hypothetical intention of the testator.

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" to my son *Richard*; and if he should leave no
" child born in wedlock, then I do give the same
" to my son *Zachary*; and if he should have no
" child born in wedlock, then I do give all my
" lands and estates in the counties of *Hertford* and
" *Middlesex*, to my daughter and her heirs for
" ever. I do give to my son *Richard* the *perpetual*
" advowson of *Husband's Bosworth*, in *Leicester-*
" *shire*, and my manor of *Stanwick*, and all my lands
" in *Northamptonshire*. I do give my son *Zachary*
" all my freehold houses, and all my leasehold
" houses at my death, that are no part of the trade,
" that are in *Westminster*, or the county of *Middlesex*,
" the rents and profits to be laid out in 4 per cents.
" in trustees names for his use. But in case he should
" not claim them in the space of six years from
" my death, then my will is, my son *Thomas* shall
" take them with all the increase. I do give to
" my daughter my dwelling house at *Redburn*, and
" all other houses and lands that I now have, or
" may have at my death, with all goods, plate, and
" every thing on the premises, with all my jewels,
" and all lands in the parish of *Redburn*. I do
" give my daughter all my Long Annuities, and all
" my Short Annuities, and all my Bank Stock, and
" all my 5 per cents. and all my Reduced 3 per
" cents. standing in my name at my death. I do
" give all my South Sea Annuities to my son *Ri-*
" *chard Pearce*. I do give my son *Thomas Pearce*
" three parts of my trade. And I do give my son
" *Zachary* one fourth of my trade, and the profits
" to be laid out in the 4 per cents. but if not
" claimed in six years after my death, then my
" will is, that my son *Thomas* shall take the share
" and

" and profits to himself, of all the trade, and all
 " my houses in *Westminster* and *Middlesex*. I do
 " give my house and lands at *Auburn* in *Wilt-*
 " *shire* unto my nephew *Richard Pearce*. I do
 " give my share of the *Margate Assembly Rooms*
 " unto my son *Thomas Pearce*. I do give to my
 " sister and her daughter, 100*l.* each. I do give
 " *Thomas Pearce*, son of my brother *Robert*, 200*l.*
 " I do give to my brother *William*'s three sons,
 " *Richard*, *William*, and *Thomas*, 100*l.* each. And
 " I do give to *Mary Woodham*, 100*l.* I do give
 " to *Mary Dickinson* 50*l.* a year for her life, out
 " of the trade, by weekly payments. I do give to
 " *John Clark*, my man, 10*l.* I do give my
 " brewer and my clerks five guineas each. And I
 " do give all my servants, that are in my house at
 " my death, five guineas each. *Thomas Pearce* to
 " have my dwelling-house, and the goods in it; my
 " plate to be divided, and my china, between my
 " children. And I do desire to be buried at
 " *Flamstead*, in my vault. And I do direct that
 " all my debts and legacies to be paid, and my
 " funeral expenses to be paid. I do appoint my
 " son *Thomas*, and my son *Richard*, and my
 " daughter *Mary*, joint executors and residue
 " legatees to this my will. *Richard Pearce* (L. S.)
 " signed in the presence of us, this 20th *May*
 " 1795. *Anthony Robinson*.—*Eusebius Sweet*.—
 " *Joseph Byles*."

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"The said testator died in *January 1800*, without
 having altered or revoked his said will, otherwise

than

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'The said testator, at the times of making his said will and codicil, and at the the time of his death, had two sons, namely, *Thomas Pearce* and *Richard Pearce* (his son *Zachary* having died in his life-time), and a daughter, namely *Mary*, now the wife of *John Hotchkiss*, all named in the will.'

'*Thomas Pearce*, the eldest son, died in 1802, without lawful issue, but having duly made his will, and devised all his real and personal estates, of every nature and kind whatsoever and wheresoever, and such real and personal estates which he might thereafter acquire by any means whatever, unto *John Crutchfield* (one of the lessors of the plaintiff), and *John Emmett* (since deceased), in trust, to be sold for the benefit of his two natural children, who are also lessors of the plaintiff.'

'*Richard Pearce*, the second son, at the time of the date and execution of his said father's said will and codicil, was a clergyman, and *was the incumbent of the rectory of Husband's Bosworth* aforesaid.'

'The said *Richard Pearce*, the son, afterwards, namely in *January 1814*, died, having duly made his will in writing, and thereby devised all his real estates to the defendant.'

* The codicil has been omitted from this case in consequence of having been considered irrelevant by the Ld. Chief Baron.—See the judgment.

The

The sole question arising on this case was, whether *Richard Pearce*, the original testator's son, took an estate for life or in fee in the lands in *Northamptonshire*, under the devise in this will, and it was twice argued at the bar on the 25th November.

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Marriott for the plaintiff, and

Denman for the defendant; and now by

Clarke for the plaintiff, and

Copley, Serjt, for the defendant.

The counsel for the lessors of the plaintiff contended (citing, in support of their propositions, amongst many others, the several cases noticed in the course of this summary of the arguments), that on the true construction of this will *Richard Pearce*, the devisee, took an estate for life only: insisting, that, to pass a fee, words of limitation, inheritance, or perpetuity, must be employed by the testator (a), unless there be other words in the will, operating to show a clear intention to pass a fee, or unless the devise were for some special purpose, which it would require a larger estate than for life to effect (b); nor is the introductory clause of itself sufficient, or indeed of any avail, except where much more comprehensive than this, and followed by words much more effectual than those of this

(a) *Right v. Sidebottom*, 2 Doug. 759.—*Roe d. Bowes v. Blackett*, Cowp. 235.—*Roe *ex dem.* Kirby v. Holmes*, 2 Wils. 80.

(b) *Doe d. Bates v. Clayton*, 8 East 144, per Lord Ellenborough.

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devise (c); that an heir at law can in no case be considered to be disinherited by a testator by mere implication, without express words, or manifest intention, appearing from the reasonable construction of the will; and that where there is doubt the heir is always considered to be entitled to the benefit of it (d). "Land," (the word used in this devise) is not alone sufficiently powerful to pass an inheritance (e). If the words of a will may be satisfied by construing a devise to be only of an estate for life, it cannot be constructively extended against an heir at law (f). Now there is nothing like an intention to disinherit the heir at law manifested on the face of this will; and the devise to *Richard* is not only satisfied by his taking an estate for life under it, but it is impossible, according to the established rules of construing wills, to extend the effect of that devise, so as to give him a greater interest. The more recent case of *Paice v. The Archbishop of Canterbury* (g) acknowledges and confirms the earlier doctrines in all respects: There, the testatrix gave her farm and lands at *Rogston*, to the Reverend *Henry Taylor*, his heirs and assigns, for ever; and also gave and bequeathed to the said Reverend *Henry Taylor*, her farm and manor of *Eythorne*

(c) *Ibid.*—*Den. v. Gaskin*, *Coupl. 657.*

(d) *Gardner v. Sheldon*, *Vt. 62.*—*Roe d. Halling v. Yeud*, 2 *N. R. 220.*—*Willes*, 141.—*Doe d. Briscoe v. Clarke*, *ib. 343.*

(e) *Right v. Sidebottom*, *ante.*

(f) *Goodnight v. Barron*, 11 *East 222.*—*Chester v. Prin- ter*, 2 *P. W. 355.*

(g) 14 *Ves. 369.*

Court;

Court; and the *Lord Chancellor* held that the second devise passed only an estate for life.

[*THOMSON, Chief Baron.* In that case much reliance was placed on the connecting phrase "and also."]

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Then the giving the perpetual advowson cannot control the subsequent devise of the lands, even supposing that previous epithet to have been used to denote a perpetuity, which is certainly not its import in legal acceptance; nor can the introduction of that epithet by any means extend the estate given in the advowson; for quite as much would have passed without the use of the word perpetual. It is moreover a species of property limitable to any restriction of extent, as for years, for life, in tail, or in fee; and therefore as capable of diversity of estate as any other species of freehold property.

On the part of the defendant, it was insisted, that according to the intention of the testator, as obviously apparent from the general tenor of the whole will, and on the principles deducible from the majority of the cases on the construction of doubtful devises, the devisee, *Richard Pearce*, took an estate in fee in the property devised to him. It was admitted, that without the aid of the introductory part of the will to explain the testator's intention of giving the devisees a permanent interest, by parting with his whole estate, the defendant's case could not be completely sustained; the word goods, there used, would not alone be capable of

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of conveying a fee; but the extensive expression, "do dispose of all my worldly goods," used by a testator in contemplation of death, and immediately followed by an absolute devise of land, may surely be considered as equivalent to his using the word estate.—Taking the whole will together, this is a devise of an estate of inheritance, even without words of limitation, with the operative effect of which it is clear that this testator could not have been acquainted; yet his object plainly was to provide equally and permanently for all his children, and to give estates of inheritance to each.—To sustain the proposition, that the introductory words might be used as explanatory of the testator's intention as to the extent of the devise, they cited the case of *Pitman v. Stevens*, where Lord *Ellenborough* said, in the construction of wills hardly any words are to be found of so inflexible a meaning as not to bend to the plain sense of the context (*h*); that so explained, a devisee might take a fee without words of limitation. So also *Roe lessee of Shell v. Pattison* (*i*), wherein Lord *Ellenborough* adverted to the case of *Doe v. Tofield* (*k*), in which that Court had decided, that the real estate passed under a devise of personal estate, if it were clear that such was the intention of the testator. In *Loveacres v. Blight* (*l*), where lands were given to two, freely to be possessed, the same latitude of construction was

(*h*) 15 East 510, and *Roe dem. Bates v. Clayton*, 8 East 147.

(*i*) 16 East 221, and *Doe d. Andrews v. Lainchbury*, 11 East 290.

(*k*) 11 East 246.

(*l*) Cwmp. 352.

adopted,

adopted, although the implication is very remote. Then the devise of the land, in this case, is preceded by a devise of the perpetual advowson, which is forcibly explanatory of the testator's contemplation of a perpetuity.

[THOMSON, C. B. Perpetual advowson does not carry it farther than advowson: any thing short of advowson is the next presentation.]

But used in a will it may be taken as indicative of the testator's intention to give as large an estate as he could, and to show that he contemplated a perpetuity; it is equivalent to the words, "*habendum sibi in perpetuum*," which are said in Litt. b. 3. s. 586, to be sufficient in a will to pass a fee. And there is a material fact found in this case, that the devisee of the advowson was, at that time, the actual incumbent of the living, so that it was analogous to a devise of the inheritance to a tenant for life, for otherwise he took nothing.

The legal axiom, that express words or necessary implication are required to disinherit an heir, has been doubted (*m*); and in *Moore d. Tagg v. Heaseman* (*n*), it is said by Lord Chief Justice Willes, that, if that rule were to be taken strictly it would overturn a great many resolutions; and that is a case which very considerably relaxes what is said to be the rule in *Gardner v. Sheldon*. And Courts now will effectuate the intention of a testator, as far

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(*m*) *Roe d. Helling v. Yeud*, 2 N. R. 221.

(*n*) *Willes* 140.

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as it is apparent in favour of a devisee, even against an heir, as in the case of *Bowes v. Blackett*, cited on the other side, where, in support of that doctrine, it is expressly held by Lord *Mansfield*, that if such an intention appear as is sufficient to satisfy the conscience of the Court, that a devise of lands *without any limitation added was meant to pass a fee*, the Court would so construe it. His Lordship observed also, that in that case no inference could be drawn either one way or other. Here too the heir at law had been amply provided for, which is stronger than if he had been given a shilling; and on that doctrine, the introductory words,—the devise of the *perpetual advowson*,—and the whole bearing of this will, must be construed as tending to elucidate a manifest intention on the part of the testator to give a fee in the lands devised to *Richard Pearce*.

[THOMSON, C. B. An advowson is capable, as well as other property, of being limited for life, and in that case the devisee might present during life *toties quoties*.]

There are no words of restriction used in this devise.

If it should be decided that *Richard Pearce* did not take the fee absolutely under the devise, then, according to the cases, and particularly *Pitman v. Stevens*, he would take it under the residuary clause..

In reply, it was urged, that the word goods never had been yet held sufficient to carry a fee, whatever other inefficient words, coupled with a subsequent devise, might in some instances have been construed

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construed to effect, on the ground of apparent intention: and in all the cases cited, the expression was far more extensive, as "lands," "estate," &c.: As to the devisee's having the incumbency, the right of presentation would sufficiently have augmented his interest in the advowson to obviate the objection of his taking nothing, if he was not to take for a greater estate than for life. Perpetual advowson is merely the popular term. The testator's bounty to his heir, so far from strengthening this defendant's case, beyond those where the heir is bequeathed a shilling, operates the other way, inasmuch as it shows he might have considered him amply provided for. The cases cited to subvert the axiom, That the heir cannot be disinherited but by express words, or necessary implication, are merely cases of exceptions to that general rule; and in all those there are personal conditions on the devisee to make payments. In the case cited of *Pitman v. Stevens*, where the Court extended the construction beyond any preceding case, there was a recommendation of handsome treatment towards the testator's brother-in-law, and to do something for him at his death.

Monday,
May 8.

THOMSON, *Chief Baron*, having pointed out the material clauses of the will on which the question depended, and observing that the codicil which had been introduced into the case, had been unnecessarily so, as nothing turned out on it in the argument, now delivered the opinion of the Court, as follows:

This is in substance an ejectionment brought by an heir

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heir at law, that is, by the devisees of that heir against the devisee of the person to whom the original testator had devised an estate in the premises in question: On the part of the heir it is insisted, that he is entitled, as heir at law, to all the testator's real property, not expressly, or by necessary implication, devised away from him. On the other side it is contended, that a manifest intention is apparent on the face of this will, on the part of the testator, to give to *Richard Pearce* a fee in the estates in *Northamptonshire*; and that the effect of that apparent intention operates to pass that estate.

Now certainly, in this, as in all other cases of wills, made by persons unacquainted with the legal effect of words used in devising property; if one were permitted to indulge in private conjecture, whenever a testator gives in terms a house or land, he means to give it as absolutely, as if it were a horse, or any other article of personal property: but by the rules of law such devises are certainly not so to be construed.

It is contended, on the behalf of the defendant, that an indication of such plain intention is clearly to be collected from the testator having given to *Richard* the perpetual advowson of *Husband's Bosworth*; in which (it was argued), that the testator thereby intended that the devisee should take a fee, not only from his having used the word perpetual, but from the fact of *Richard Pearce*, the devisee, being at the same time Rector and actual Incumbent of the advowson, urging therefore that more must have been intended to be given him than

than a life estate, inasmuch as he was already in possession of as beneficial an interest in it as could arise to him during his life : and that a fee having so passed in the advowson by that devise, the devisee was also entitled to an equal estate in the manor of *Stawick*, and all the testator's lands in *Northamptonshire*, because it was obvious from the words of the preceding devise, that the testator contemplated a perpetuity of interest, and, that that contemplation controlled and directed the operation of the words of the devise which immediately succeeded, connected as they were, and forming part of the same sentence.

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Now it is not necessary, nor would it indeed be proper, for us to decide what estate *Richard Pearce* took in the advowson ; for even admitting that the words were sufficient for passing a fee as to that part of the devise, we are entirely of opinion, that it would not necessarily follow therefrom that a fee also passed in the premises for which the present ejectment is brought.

It was also argued, that the intention to give a fee was further manifested by the introductory words, which declared the object of his will to be the gift and disposal of all the testator's worldly goods, and that those words showed that, whatever he afterwards devised he meant to give absolutely. There certainly are many cases where introductory words, to the full as strong as these in this will, have been construed not to extend to carry a fee, and so it has been accordingly often decided : and to establish that position numberless cases have been cited, some of which

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which are not very applicable. The cases wherein there were charges of debts or legacies on the bequests to the devisee, have been very properly left out. In the case of *Roe* on the demise of *Kirby v. Holmes*, the devise was to the testator's daughter, her heirs and assigns, for ever; with a devise over, in case of her dying before twenty-one, without issue, to his nephew *John Hardisty*;—it was contended, that the son took as ample an estate as the daughter, but the Court said he took an estate for life only; for had the testator intended to give him more, he understood the force of words of limitation, as appeared by the devise to *Jane*, and he knew how to have done it. The same may be observed here, the testator having also used words of limitation in the devise over to his daughter; and from the omission of those words it appears that it was not his intention to give a further interest.

We have thus abstained from giving an opinion on the devise of the advowson to *Richard*.

Then the case in *Douglas*, of *Right v. Sidebotham*, is extremely material;—there the testator sets out with giving and disposing of all his worldly goods and estate, which makes it a stronger case than the present. Then he gives to his sister *Susannah* one shilling, and to her son a shilling. He then gives to his wife, *Susannah Sparrowhawk*, all the rest of his goods and chattels, and personal estate whatsoever. ‘Also I give and devise to *Susannah Sparrowhawk*, my said wife, her heirs and assigns, for ever, all my lands lying in the parish of *Bampton* in the county of *Oxford*. And I give

' I give and bequeath to my loving wife aforesaid, ' all my lands, tenements, and houses, lying in the ' parish of *Chipping Norton*.' The question being argued on the special verdict, the Court held that she took only an estate for life in the subject of the last devise, although comprised in the same sentence in which he had given her the previous estate in fee, and that for want of the words of limitation being repeated. On that argument, the old case of the *Bell Tavern*, in *Salkeld* (o), was relied on for the defendant; wherein three of the judges differed from Lord *Holt*. But the words there, on examination of them, do not appear to touch the present question: they are, " I give, ratify, and confirm, all my " estate, right, title, and interest which I now have, " and all the term and terms of years which I now " have or may have in my power to dispose of, after " my death, in whatever I hold by lease from Sir " *John Freeman*, and also the house called the *Bell* " *Tavern*, to *John Billingsley* :" and if Lord *Holt* had not thought otherwise, I should have considered it a plain and not at all a strained construction, to say, that the testatrix, by those words, devised all her estate and interest in the *Bell Tavern* as fully as she had done in all the other things before devised. In the case of *Den v. Gaskin* the devisees took only an estate for life, for want of words of limitation, and that devise was held not to be extended by the words of introduction. So it was ruled in *Right v. Russel*, determined in this Court; and I happen to be possessed of Mr. Justice *Aston*'s note of that case. But what I wish most to rely on are the modern cases, and that of *Paice*

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v. *The Archbishop of Canterbury* in 14 *Vesey*, is certainly very strong and conclusive on this point. All these decisions weigh with me in thinking that the construction, giving a fee to *Richard Pearce* in the testator's lands in *Northampton*, is not what the Court would be warranted in putting on the words of this will.

The latter part of the argument, on the part of the defendant, was, that if the lands in *Northamptonshire* did not pass under the will, the devisee would take as residuary legatee. On that point we are satisfied, that the residuary clause applies entirely to the testator's personal estate. But the real question for us to determine is, whether the devisee, *Richard Pearce*, took an estate in those lands for life, or in fee, under the devise. The case of *Pitman v. Stevens*, in 16 *East*, was hinted at, on which, however, no very serious stress seemed to be laid. There the question was, whether the residuary legatee took the real estates in fee: on which I shall only observe, that there, there was a general devise of all the testator's real and personal estate; and the legatee had duties to perform incompatible with the situation of a residuary legatee of the personal estate only. He was directed, amongst other things, to allow the testator's sister to be buried in the family vault; and therefore it was, that it was held that a fee in the real estate passed to the devisee.

On the whole, the best view of the case seems to be, that the lessor of the plaintiff is entitled to recover in this ejectment. Therefore the verdict must stand.

Postea to the plaintiff.

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The KING v. GRIMWOOD.

Friday,
April 14.

PELL, Serjeant, moved for a rule to show cause why a new trial should not be granted in this case.

This was one of the several recent instances wherein the Commissioners of Excise had instituted proceedings by inquisition and *scire facias*, for arrears, against such maltsters as had accounted for the duties on malt made by them, according to a calculation of the barley requiring to be longer than sixteen days in operation during its progress through the house, (that is) in passing the several floors from the cistern to the kiln.

The Excise had calculated that barley in its operation of being worked into malt, requires, on the utmost average, an interval of sixteen days to undergo the necessary preparation for the kiln, after it has been taken out of the cistern, and laid on the couch, as it is termed. And from that calculation, added to other causes of suspicion, they had been led to infer, that in many cases where the trader had returned the quantity of malt made by him, as having occupied a greater time in its operation, he had practised a fraud on the revenue, by having in fact made

the steeping and drying, is computed by the Excise at sixteen.

Excise-books transcribed from the maltster's specimen paper admissible evidence against him, without calling the officers to substantiate them; and that although they should be charged to be fraudulent and collusive, without proof of their being so.

If the jury find a verdict for a sum certain, according to a calculation which does not warrant the amount, it is a ground for a new trial.

Proof of malt not having required so long a space of time in working, and passing through the floors, from the cistern to the kiln, as it had been entered as having taken for that purpose, will, in some cases, be considered *prima facie* evidence of fraud; and duties are recoverable for the amount of so much grain malted as would be commensurate with such excess of time as if so much of the duty were in arrear.

The average number of days necessary for working the grain intended for malt between

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as much more malt than he had accounted for in respect of the duties, as the total of days at which he had averaged his maltings amounted to *ultra* the excise average of sixteen days. Thus, if a piece of malt had been entered by him as having been in operation on the floors thirty-two days, it would have been treated as if there had been in truth two pieces worked, although only one had been accounted for; the trader being assumed to cover the account of the quantity actually malted by him under such mis-statement of the time required to be taken up in passing through the floors: the commissioners considering it as evidence of that species of fraud sometimes practised by makers of malt, known to excise officers by what is called running a wetting, which is hurrying the grain along the floors to the kiln, and, as soon as one piece of malt has been got off by such means, substituting another, which, though not in fact entered, is made to pass with the Surveyor for that which he has already taken account of, by representing it to have required a larger portion of time in working than it had really taken, so as to correspond with the further time necessary for the new piece; whereas, either steeping (according to the excise calculation) does not, in fact, on any occasion, get more on the average than sixteen days working.

In this case, the Crown had sought to recover the sum of 2,810*l.* 16*s.* 4*d.* being the sum found by the inquisition to be due to the Crown, for duties assumed to be withheld, on the calculation before noticed, and the cause was heard before

before the Lord Chief Baron, at the Sittings after Hilary Term. The witnesses for the Crown stated, that sixteen days was an ample average; and it was in evidence that the defendant had accounted for the duties on an average of twenty-five days. The jury found a verdict for the Crown generally; but, being asked on what average, they said on an average of twenty-one days to each working, being five days more than the excise average, on which the Crown had proceeded, and which would consequently proportionally reduce the amount of the arrear found to be due by the verdict.

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Another point submitted to the Court, was, that the excise-books produced on the trial as evidence on the part of the Crown, (by which it appeared that the defendant had sometimes taken as far as thirty days in single operations) were improperly admitted as evidence against the defendant. Those books (it was observed) were not signed by the defendant, nor were the duties paid by him from them. The defendant was charged also with having colluded with the inspecting officers, during the whole period for which those books purported to account; and they were said to contain fraudulent entries. On that, it had been submitted at the trial, that whatever might be the case with faithful books, these ought not to be read as evidence *per se* against the defendant, unless it were previously shown that he had been guilty of collusion with the officers, who had been subpoenaed, but were not called; but the objection was then overruled. The same objection was now again insisted on, as ground

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for granting a new trial ; the other being a mere matter of figures, it was presumed the Crown would not object to rectify the calculation, and obviate that difficulty.

THOMSON, *Chief Baron.* The admissibility of these books in evidence, has been settled in this Court, from time to time to be proper ; and, indeed, they are the only evidence adducible in such cases, consistently with the excise business ; for, if all the officers during the period to which they relate were necessarily to be called to substantiate them by proof, there would, in most instances, be an end of recovering duties in arrear. They are regularly returned to the Excise Office and from them it is that the demand of duties is made on the manufacturers, who must know with what sums they will be charged, because there hangs up in every malt-house a specimen paper, agreeing with the officer's books. In this case, too, he had paid the duties charged on him by those books, but the information proceeded for duties beyond those so charged there, and such informations have gone to a great extent in one part of the kingdom. As to calling the officers to prove them fraudulent, it would be monstrous to call on them to give evidence against the persons with whom they had colluded.

WOOD, *Baron.* If there were any objection to the books, it should have been made at the time when the duties were paid.

THOMSON, *Chief Baron.* This is not the case of

of an overcharge, but an undercharge. The books can not but be admitted *ex necessitate rei*. On the former ground of the application, the miscalculation of figures, it is probable the Crown may consent to an adjustment. In the mean time,

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Take the Rule on that ground only*.

* Cause was not shewn against this rule, the Attorney General consenting to the reduction of the debt found by the verdict to be due to the Crown, according to the average adopted by the jury.

GOODWIN v. DAVIS.

Monday,
May 8.

PERKINS showed as cause why this bill should not be dismissed for want of prosecution, that it had been referred for impertinence and scandal, which he submitted was a sufficient proceeding to save the bill.

Reference for scandal and impertinence, is a sufficient proceeding, with effect, to save a bill.

The Court held that such a reference was a proceeding with effect, intimating, that though on a reference for impertinence, a further step taken would be a waiver of the reference, it was not so where the bill had been referred for scandal.

Order discharged*.

* Vide *Hurst v. Thomas*, Anstr. 591.

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Monday,
May 8.

BASKERVILLE v. COOPER.

This Court will not admit as sufficient cause against a rule to change the venue, that the declaration contains a count on a promissory note, unless the plaintiff undertake to give evidence on such count.

JONES, D. F. having shown as cause against a rule *nisi*, for changing the *venue* in this suit, that the declaration contained a count on a promissory note, and that, in such cases, according to the rule in the *King's Bench*, that Court would not change the *venue*;

WOOD, Baron, suggested, that such a rule would render it practicable to defeat every motion for change of *venue*, by the introduction of a count on a promissory note.

Abbott referred to, *amicus curiae*, professed himself not prepared to say what would be the result of such an objection if taken in the Court of *King's Bench*.

The COURT discharged the rule; but imposed on the plaintiff terms of undertaking to give evidence on the count on the note.

Rule discharged.

END OF EASTER TERM.

REPORTS
OR
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

TRINITY TERM.—55 GEO. III.

1815.

LANG v. WEBBER.

Saturday,
May 27.

IN the course of the last term *Owen* had, on the part of the defendant, made a motion for costs, the plaintiff not having proceeded to trial in this cause pursuant to notice: and that such costs, when taxed, might be deducted from the amount of damages and costs which had been subsequently recovered by the plaintiff on the trial at *Nisi Prius*. On cause being shown, the Court being of opinion that the objects of the application were properly the subject of distinct successive motion, made the rule absolute as to the first part of it, but discharged it for the irregularity as to the second part.

The application for costs for not proceeding to trial, and for deducting the amount when taxed from the damages ultimately recovered by plaintiff, can not be made by one motion.

The latter part of such an application will be allowed in this Court.

The

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LANG
v.
WEBBER.

The defendant having got the costs which had been allowed him taxed, now moved that they might be deducted, &c.

Littledale, in opposition, insisted that the application was too late; it should have been made in *Michaelmas* or *Hilary* term at least, if at all;—that the object of the motion, if attained, would go to defeat the attorney's lien, which the Court would not permit; when a set-off of costs is allowed in the *King's Bench* it is on the terms of first satisfying the attorney's lien, and in this case it was particularly necessary, as the defendant was in execution for the debt and costs.

Owen, on the other side, observed, that the practice of the Court of *Common Pleas* was entirely with him, where the attorney's lien was considered as subservient to the equitable rights of the parties; and cited the case of *Howell v. Harding* (a), where a similar motion was granted in the Court of *King's Bench*. As to the execution, that should not have been sued out pending the present rule, and if they have done so it is in their own wrong.

The Court considered the case cited from *East* decisive, and made the

Rule absolute*.

Per Curiam. The plaintiff has taken out execution at his peril, it devolves on him to take care that only the proper amount is levied.

(a) 8 *East* 362.

* Vide *Murphy v. Cunningham*, Anstr. 271, and *Gibb v. Chaytor*, Ib. 279.

ATTORNEY

1815.

ATTORNEY GENERAL v. ELLIOTT.

Saturday,
May 27.

JERVIS and *Wyatt* moved, pursuant to notice, that the defendant might be ordered to produce, and leave in the hands of his clerk in Court, the several boxes mentioned in his answer to this information to have been deposited in his hands by *Joseph F. W. Des Barres*, mentioned in the pleadings, to be opened in the presence of the Solicitor to the Admiralty, for the purpose of examining the contents, and taking a list of the charts, drawings, or plans therein contained, and in the information alleged to belong to his Majesty.

The information stated, that *Des Barres* had been employed by the Admiralty to survey the coasts and harbours in *Nova Scotia*, with a stipendiary appointment;—that he and his assistants, having completed the undertaking, returned to *England* for the purpose of superintending the engraving of plates therefrom; and also of certain plans of the coast of *North America* surveyed by *De Brahm* and Major *Holland*, by the Directors of the Board of Trade; for which he was to receive a further remuneration, and that the latter were delivered to him for that purpose;—that such plates were accordingly completed;—that divers impressions were taken from them by *Des Barres*:

That the object of

The Court will not grant an application made on the coming in of defendant's answer to a bill for discovery, to search the boxes of an absent individual, (which have been left in the hands of the defendant as a depositary) for the purpose of ascertaining whether the property of the applicant be there, on a bill filed for that purpose, to aid by such discovery an information in the nature of an action of detinue, unless good reason be shown, through the medium of facts disclosed by affidavit, for the supposition, that the identical thing sought, be there, and that the party applying has an interest in the object of search.

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GENERAL
v.
WYATT.

—that he received the whole of the stipulated remuneration for those services; and that the whole of the said charts and plates were the property of his Majesty:—that he never delivered the original charts to his Majesty:—that he was afterwards appointed Governor of *Prince Edward Island*, and now resided there:—that previous to his leaving this country he deposited all the said charts and plates with the defendant, and that the same were now in his possession or power, and that he had been applied to to deliver them up, and had refused, on pretence of not having them in his possession or power, and that such plates, &c. were the property of *Des Barres*, and not of his Majesty; but plaintiff charged the contrary; and that the same, so being the property of his Majesty, ought to be delivered up, to be preserved for the advantage of the naval service, and the merchants trading to those parts; and that the plaintiff had filed the present information in the nature of the action of *detinue* for the recovery thereof, in which he could not safely proceed without a discovery in the matters, &c.

The defendant, *Elliott*, in his answer, denied knowledge of the previous facts charged, except as far as by the said information and general report; but he admitted *Des Barres* having deposited with him divers boxes; some of which were nailed up, which he had been informed contained plates and impressions of the *Atlantic Neptune*; but whether they contained any charts, drawings or plans from which the same were engraved, he did not know, nor could set forth, as to his belief or otherwise, save

as

as aforesaid, nor with whom *Des Barres* deposited the same, or how he disposed thereof, unless they were in the said boxes, which the defendant had not opened or examined. Defendant admitted the demand of the boxes, and refusal to deliver them, on the ground of their and their contents being the private property of *Des Barres*.

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GENERAL
v.
WYATT.

In support of the motion it was contended, that the defendant having admitted the possession of the boxes, and not having said that he even believed there were no charts in the boxes, there was sufficient ground for the order for inspection in the presence of the Clerks in Court on both sides, as was done in the case of *Purcell v. Macnamara*.

It was submitted, that the Crown was without remedy at law, unless this discovery was ordered by the Court; and admitting the application to be novel, they contended that it was within the principle of the accustomed practice.

Heys, on the other side, insisted that the order sought could not be made, and more especially in the present stage of this proceeding, whatever might be done on the hearing: that no foundation had been laid for the application. They have shown no reason for the conjecture that these boxes contained the charts, &c. mentioned in the information, as they ought to have done, nor have they shown that clear interest on the part of the Crown, in the objects of search, which it is incumbent on them to establish for the present purpose, or even described

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described them with sufficient certainty or accuracy to entitle them to seek such an interference of the Court. There is no connection between the charges in the information and the admissions in the answer which can supply their omissions, and the Court will not interfere to open the box of an absent party on an uncertain chance.

The COURT were of opinion, that the bill, unsupported as it was by affidavit, was insufficient for the purpose of the application;—that it was not aided by the admissions in the answer; and that to lay any ground for such a motion, it ought to be materially amended, and supported by affidavit, so as to show that there was good reason to believe that the property of the Crown was contained in the boxes; otherwise the Court would be needlessly exposing the private depositaries of individuals without cause.

Motion refused.

Monday,
May 29.

The COURT did not sit on this day.

ALLISON

1815.

ALLISON v. NOVERRE and others.

Wednesday,
May 31.

A RULE had been obtained by *Owen*, calling on the plaintiff to show cause why the Master should not review his taxation of the costs in this suit.

It appeared by the affidavits on which the motion was originally made, and the rule now opposed, that the action had been brought in the month of *August 1813*, against the defendants, who were three of the Directors of the *Norwich Union Life Insurance Office*, on a policy of insurance.

The venue, originally laid in *Middlesex*, (the plaintiff being an attorney, conceiving he had a right so to lay it) had been changed to *York*, by his consent, where the cause was to have been tried at the Summer Assizes, 1814. On the 6th of *July* the plaintiff sent to *Carmarthen*, to subpoena two witnesses, to attend the trial on his behalf. On the same day the defendants obtained an order from Mr. Baron *Richards* to amend, by adding another plea to the nine already

If a plaintiff subpoena witnesses in a cause then ready for trial, but which does not afterwards, in fact, come on to be tried, in consequence of his declining to reply, and take issue on a new fact, subsequently put on the record by additional plea—the expenses of the actual attendance of those witnesses are allowable on taxation of his costs, (the plaintiff ultimately succeeding on the trial of the cause) although he do not countermand his notice of trial in time, notwithstanding there

might have been time enough for him to have done so, during the intermediate period, and even to have replied and taken issue on the additional plea—on the ground that a plaintiff shall, in such case, be considered entitled to a reasonable time to give instructions for advice, and otherwise to prepare himself.

But it should seem, that in such cases there must appear to have been some unnecessary delay, or other suspicious conduct on the part of the defendant.

pleaded

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and others.

pleaded by them, the substance of which was, that the plaintiff had misrepresented the age of his wife, on whose life the policy had been effected. The plaintiff had notice of the amendment on the 8th; but finding that it was then too late to supply himself with the register of his wife's baptism, from a parish church in a remote part of the county of *Pembroke*, (which he was advised was a necessary document to controvert the new fact put on the record by the additional plea) in time for the Assizes at *York*, the commission-day being the 23d, he declined taking issue on it, and filed no replication. He then countermanded the notice of trial, and wrote to *Cardmarthen* on the 18th, to prevent, if possible, the attendance of the witnesses subpoenaed; but it was too late, the witnesses having already set out. They did attend at *York*, and the plaintiff paid their expenses, amounting to the sum of 64*l.* 16*s.* The defendants did not receive the notice of countermand, dated the 18th, till the 20th of *July*.

The cause was ultimately tried at the Spring Assizes, 1815, and the plaintiff obtained a verdict. On the taxation of costs, the deputy clerk of the *Pleas* had allowed the plaintiff, for the expenses of those two witnesses, the sum of 54*l.* 2*s.* 8*d.* incurred by that attendance, which it was insisted, on the part of the defendants, should not have been allowed, for that there had not been a due countermand of the notice of trial given, as there might have been; and that there had been full time between

tween the 8th and the 23d of *July*, to have prevented the attendance of the witnesses.

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Dauncey, showing cause, denied the necessity of countering the notice of trial in this instance, as, in consequence of the defendants having added a new plea, the cause was, in fact, not then completely at issue; and attributed the expense complained of to the dilatory conduct of the defendants, in not having added the plea before; during so great a protraction of a cause, which it was the interest of the plaintiff to expedite, and that of the defendants to prolong, and which, had the plaintiff not waived his privilege for their accommodation, might have been tried in *Middlesex*, so long ago as the *Michaelmas* Sittings, in 1813.

Owen, replying, observed, that the plaintiff, by countering, although out of time, according to the practice, had admitted the necessity of so doing, and having neglected it had involved himself in the charge of remunerating the witnesses brought by him: —That there had been a period of seventeen days, in which the plaintiff might have taken issue on the new plea; therefore he was himself the cause of the delay complained of; nor was he, as had been said, entitled to take merit to himself for having consented to a change of *venue*, for it would have been permitted of course, the greater number of the defendants witnesses living in *Yorkshire*; — and that the plaintiff had no such privilege in laying his *venue*, as had been lately held by this Court, in

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and others.

a case wherein they decided that they could not recognize an attorney as such generally, and that none but the attorneys of the Court were entitled to its privileges in that character*.

The COURT decided, that the Master had exercised a proper judgment in allowing the witnesses their necessary expenses;—that all the delay was attributable to the defendants, who had lain by for so long a time as till the 6th of *July* before they filed the new plea, the cause being then actually ready for trial;—that the plaintiff could not have had notice of that plea until the 9th, and he must be allowed time for instructing and taking the advice of his solicitor and pleader: there was, in fact, no issue on that plea, or time for taking issue; the plaintiff appeared to have written immediately, at least within a reasonable time, to countermand the steps which had been then taken, and

June 15, 1814.

* FISHER v. FIELDING.

An attorney (not being one of the four attorneys of this Court) is not as such entitled to the privilege of laying his venue in the county of Middlesex.

Hughes, showed, as cause against a rule for changing the venue in this cause from *Middlesex* to *Lincoln*, that the plaintiff was entitled to lay it in *Middlesex*, by virtue of his privilege as an attorney, although he was not one of the sworn attorneys of this Court; for that the principle on which that privilege was founded, his assumed constant attendance in business on the Courts, extended alike to each of the Courts sitting in *Westminster Hall*; but

The Court held that the privilege was not so general; and that in the Exchequer it was limited to the sworn attorneys; and the other practitioners recognized by the Court only. They, however, allowed the plaintiff to bring back the venue, on his undertaking to give material evidence in *Middlesex*.

his

his having done even more than was necessary on his part, ought not to prejudice him. The expenses were necessary; and the plaintiff having ultimately succeeded, must be considered entitled to have them allowed on the taxation of costs.

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ALLISON
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and others.

Rule discharged, with costs.

CALVERT v. BOWATER and another.

Tuesday,
May 30.

OWEN objected to the notice of justification of bail which had been given in this case, that it was signed by the attorney in the cause, and not by the Clerk in Court.

All notices must be given and received in the names of clerks in Court.

THOMSON, *Chief Baron.* Certainly, all notices must be given and received in the names of Clerks in Court.

The Court however intimating that they would give further time in such a case, the objection was waived.

But in a case of bail, the Court will give on such an objection further time to justify.

Owen then took another objection, that the defendant, who was in custody at the suit of the plaintiff in this cause, had been sued jointly with another; yet the bail-piece was entitled in a cause

And they will permit a justification where the title of the cause is not correctly set out in the bail-piece.

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of *Calvert v. Bowater* only, which was not the cause in which he had been arrested.

CALVERT

v.

BOWATER
and another.

But the bail were allowed to justify: for

Per Curiam.—If there is no such cause the justification will go for nothing.

Saturday,
June 3.

HEMING v. EMUSS.

A special injunction to restrain a defendant from distraining, will be granted before answer, if the defendant be in contempt for not having answered.

SIMPKINSON moved, on affidavit, for an injunction to restrain the defendant from cutting and carrying away timber, and from distraining for rent; showing, by production of the attachment, that the defendant was in contempt for want of answer.

RICHARDS, Baron, expressed considerable doubt whether the Court should grant such a special injunction before answer, but as the defendant was in contempt the Court granted the motion.

ATTORNEY

1815.

ATTORNEY GENERAL v. POLE.

Wednesday,
June 7.

THE defendant had pleaded to *scire facias* on the usual bond * to the Crown, for securing the shipping of glass, pursuant to his notice to the Excise of being about to export 20 cwt., for the purpose of being allowed the drawback on such exportation: That the said bond had been given in pursuance of the 26 Geo. 3, ch. 77 †.—That two puncheons (part of the goods secured to be shipped, &c.) had, after the making of the said bond, been regularly shipped, in pursuance of the said Act, and according to the condition of the said bond;—that he was about to have shipped the residue of said glass; but that, before he could so ship or put on board the same, or any part thereof, the officers attending the shipping such glass came alongside the vessel, and after examining part of the said glass, caused

* Reciting the notice of intention to export, and that there was a drawback allowed, and conditioned that 'if the several commodities in the obligations mentioned, and every part thereof, should be shipped and exported, and not unshipped, unloaded, or laid on land, or put on board any other ship or vessel within Great Britain, (shipwreck or other unavoidable accidents excepted) then, &c.'

† Sec. 3. And the exporter of such glass shall, also, before the shipping the same, give sufficient security to be approved, &c. in treble the value of the duty intended to be drawn back, that the particular quantity of glass to be exported, and every part thereof, shall be shipped and exported, and shall not be unshipped, unloaded, or laid on land, or put on board any other ship or vessel in Great Britain.

that the glass was lawfully seized for having a certain quantity of earthenware packed with it; and such replication held insufficient on demurrer.

Plea to *scire facias* for breach of the condition of the usual bond given not to re-land, where the merchant claims drawbacks on goods intended for exportation;— that defendant was prevented from shipping and exporting accordingly, in consequence of seizure of part of the goods by revenue officers, not answered by replication, that the glass had not been regularly shipped, or intended so to be, nor agreed in quantity with the notice given; imputing also a charge of fraud in attempting to obtain allowance of the drawbacks for a larger quantity than was actually shipped; and alleging,

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the said part so shipped to be re-landed, and the whole of the said glass to be unpacked ; and that the same was, by colour of the said Act of Parliament, seized, and kept until it was long afterwards restored to him by the Commissioners ; and that he had thereby been prevented from shipping and exporting the said glass, according to the form and effect of the said condition :—That there had been no just cause for the seizure ; and that he had not applied for any certificate, debenture, drawback, &c. in respect of said glass, nor had intended any fraud.—Replication 1st, That the said 20 cwt. of glass was not shipped, &c. according to the condition of the said bond : 2ndly, That two puncheons had been shipped, containing 2 cwt. 3 qrs. 9 lb., as part of 11 cwt. 1 qr. 9 lb. of flint-glass, parcel of said 20 cwt. ; and that defendant was about to have put on board 5 cwt. 3 qrs. 10 lb. as the residue of said 11 cwt. 1 qr. 10 lb. (not amounting to 11 cwt. 1 qr. 9 lb.), for the purpose of defrauding the revenue by obtaining the drawbacks—traversing, that the shipment had been regularly made (according to the averment in the plea) in pursuance of the Act ; 3dly, the same as the 2nd, with a traverse of the defendant's intention to ship the remainder : 4th, That amongst the said glass packed for exportation on drawback were deposited 50 lb. weight of earthenware, subjecting it to forfeiture, and that it had therefore been seized ; and subsequently restored ; traversing, that defendant was prevented by such seizure and detention from performing the condition of the said bond.—Demurrer to the 1st replication, for that it contains no answer to the plea, and neither denying, nor confessing and avoiding, is argumentative,

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POLK.

mentative, evasive, and multifarious, denying the matters in said plea by implication only, and tending to put in issue the whole of the matters of the plea, though issue might be taken on parts of them:—Rejoinder to the 2nd, That the glass in the condition of the bond mentioned was, in fact, the same as mentioned in the replication, though of less weight than 20 cwt.: That defendant, notwithstanding the notice, never intended to export, under colour of the bond, or obtain the drawback on more than was actually shipped; traversing the imputed intention of fraud;—to the 3rd, the same, traversing the intent to obtain the drawbacks on a greater weight of glass than should be shipped;—to the 4th, That the glass had been packed in the presence of the officer, who took an account of the contents, and sealed it; admitting that certain small quantities of earthen ware had been packed without design, but alleging that it amounted to no more in weight than 1 lb. Joinder in demurrer, and demurrer to the rejoinder, it being no answer to the 2nd, 3rd, and 4th replications, tending to put in issue several distinct and separate matters, and being a departure from the plea.—Joinder in demurrer.

Littledale supported the demurrer, contending that the replication had not shown a forfeiture of the bond:—The common practice in all such cases is, to give security in a larger sum, and for a greater quantity of goods than are intended to be exported. It is admitted that a part had been shipped, and that then the officers seized, whereby defendant was necessarily prevented from performing the condition of the bond. The Crown have be-

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sides alleged fraud, on which, when it is denied, they refuse to take issue.

[*Wood, Baron.* The question of fraud could not be tried on the bond ;—it would have been an immaterial issue.]

Walton, contra, was stopped by the Court.

Per Curiam. No sufficient answer has been given by the replication to the defendant's plea, which is certainly good as an excuse for not shipping. The suggestion of fraud has nothing to do with the question on the breach of the bond, but should be the subject of another proceeding. There is a penalty imposed by statute on such offences. The revenue officers prevented, by the seizure, the exportation of the goods, and that appears on the face of the pleadings, therefore the bond was not forfeited, for that says nothing about duly shipping, nor provides against practices of fraud; nor is there any given time limited within which the shipping and exportation of goods are to take place. It is impossible to assign a breach on this bond.

Judgment for the defendant.*

* By a subsequent statute, 55 Geo. 3, ch. 113, reciting the 26th Geo. 3, and that no time is by law limited within which glass entered for exportation shall be shipped, it is provided that, from and after the 5th of *July*, 1815, the security shall be taken that such glass shall be shipped and exported within one month from the date thereof.

ATTORNEY

ATTORNEY GENERAL v. —— KELSEY.

Saturday,
June 10.

THE defendant had been arrested, and sent to *Dover Castle* under the constable's warrant, issued on a *capias* sued out of this Court on an information filed against him, charging him with the importation of prohibited goods.

The *capias* and warrant described him as —— *Kelsey*. The information had been filed against him by the name of *James Kelsey*; and on the alleged irregularity, and an affidavit of the facts, and that the applicant's proper name was *Richard*, and not *James*.

The Court will not discharge a defendant out of custody, on filing common bail, who has been arrested on a *capias*, describing him by his surname only, omitting his name of baptism, if he has appeared, although by a wrong Christian name.

Taunton, W. P. had obtained a rule to show cause why the *capias* and proceedings should not be quashed, and the applicant discharged out of custody on common bail, undertaking not to bring any action. The Court, on that occasion, threw out that they entertained considerable doubts whether, in cases of proceeding by information, they could, under any circumstances, direct a defendant in custody to be discharged on filing common bail, as the *Attorney General* is entitled to a *capias* on all such occasions, which necessarily imports that bail is required.

Sed quere, if he had applied in the first instance, before appearance or plea.

Dauncey showed for cause, that after the most diligent

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— KELSEY.

diligent inquiries the Christian name of the defendant could not be ascertained at the time of the arrest; and that it was by no means unusual in such proceedings so to make out the *capias* in blank. And that even if the motion were well founded, the application should have been made before, as the defendant had now cured any defect by having appeared and pleaded by the name of *James*.

[*Thomson, Chief Baron.* That is equivalent to a waiver of every thing. Substituting the name of *Richard* would be quite superfluous after that.]

Taunton, in support of the rule, adverted to the distinction to be taken in this case, where the process itself was absolutely void. If there were any waiver of irregularity by the appearance, that could only apply to the information. The question therefore would be solely, whether a defendant arrested on a *capias*, wherein the person to be taken was described by his surname alone, was properly arrested by such process; or, whether he ought not to be discharged on filing common bail. This was frequently done in common cases; and in that of *Wilks v. Lork* (a) the Court discharged a defendant arrested by a wrong Christian name; so in *Rex v. Sheriff of Surry* (b). Those were cases of a right person arrested, though sued by wrong name, as here. And the officer is in such case a trespasser, and liable to an action, and cannot justify such a

(a) 2 *Taunton* 399.

(b) 1 *Marshall* 75.

taking.

taking (c). In Sir *M. Foster* it appears that a mistake, with regard to a name of dignity, in an act of attainder, is fatal; because there is no such person in *rerum natura*. The defendant, in this case, has no means of knowing whether he was the person meant by the warrant. It was also urged, that on so vague a process, the Court, *in favorem libertatis*, would not suffer the subject to be imprisoned.

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Wood, *Baron*. If the process is void, your remedy is by action; but the irregularity, as it affects the proceedings, has been cured. Wherever an application is made to the Court for summary relief, the party must always come in the first instance.

Per Curiam.

Rule discharged, without costs.

(c) *Shadgett v. Clipson*, 8 East 328.—But it seems from the cases, that where defendant has let an opportunity of pleading in abatement pass by, the Court will not relieve him.

THE

1815.

Tuesday,
June 13.

THE KING v. BUNNEY and another, Assignees of Pearce a Bankrupt.

The Court will not set aside an extent in aid, on the ground that the debts levied under it is of greater amount than the debt. sworn to be due from the original debtor of the Crown, although the party move it on the condition of paying the Crown's debt.

A N extent had issued against the effects of the bankrupt, under the *fiat* of the *Chancellor of the Exchequer*, in aid of *Thomas Merriman & Co.* bankers at *Marlborough*, on the affidavit of *Merriman*, that he and his partners, as receivers of the excise-duties from the collector for the commissioners, were indebted to the Crown in the sum of 1,043*l.* received by them from the collector, and that *Pearce* was indebted to them, for principal and interest, on bond, in 1,193*l.*; which sum the sheriff levied under the writ on the inquisition.

Holroyd now moved, on the behalf of the assignees, that the extent might be withdrawn, on payment by them of the sum of 1,043*l.*, so found to be due to the house of *Merriman & Co.*; but without hearing the counsel for the Crown.

Per Curiam. We have often decided, that assignees cannot recover money so levied, on motion of this nature. The Crown's debtor has a right to the prerogative process, and having once levied his debt he is entitled to retain it.

Motion refused.

THE

THE KING v. WILLIAM MALLET and JAMES
MALLETT.Same Day.

THE KING v. JAMES MALLETT.

LAWES had moved, on *Friday*, to set aside two writs of extent, which had been issued against the defendant for arrears of malt duties, under which he was in custody, for irregularity: but the writs not being before the Court they refused to receive the motion.

The Court will not entertain a motion on a case of extent, without having the writ before them.

It was now moved again, on an affidavit, stating, that on searching the Remembrancer's Office it appeared, that on the 10th *September 1807*, *William Mallet* (the applicant), and *James Mallett*, were found by inquisition to be indebted to the Crown in the sum of 511*l.* 19*s.* 8*d.*, for duties of excise on malt made by them at *Bristol*, between the 18th *December 1806*, and the 25th *June 1807*, on which a *fiat* was granted for a writ of extent against them, jointly; and that there was also another extent issued on the same day, against *William Mallett* alone, for the sum of 187*l.* 4*s.* for duties of excise on malt made by him, between the 24th day of *June 1807*, and the 24th *August* following.

If two writs of extent are issued, one for a joint debt, and the other for a separate debt, in the *same sum*, on inquisitions finding a joint debt, and a separate debt, in *different sums*, the Court will not set them both aside, on the ground of the irregularity of one of them, though confessedly a mistake, but they will support that which can be shown to be correct.

An extent may be issued on an inquisition, and fiat of eight years old, and no new affidavit or fiat is requisite, nor is any proceeding, by *scire facias*, or otherwise, necessary to revive such extent.

Where a joint debt has been found, the death of one of the debtors in the interval between the fiat and extent does not vitiate the proceedings.

The

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MALLETT,
&c.

The affidavit further stated, that on or about the 13th *February* 1815, a writ of extent for the said sum of $511 l. 19 s. 8 d.$ was issued against them the said *William Mallett* and *James Mallett*, jointly, and that on the same day another writ of extent was issued against the said *William Mallett*, alone, for a further sum of $511 l. 19 s. 8 d.$ which appeared to be grounded on the same inquisition; and that there was not in the said office any other commission and inquisition returned, or *fiat* obtained against them jointly; nor any entry on the roll of the issuing of any subsequent writ of extent for the said debt of $511 l. 19 s. 8 d.$: and that it did not appear that the original proceedings for recovery of the said joint debt, had been revived against the defendant, *William Mallett*, by *scire facias*, or otherwise.

In support of the motion it was stated, that in *March* 1811, *James Mallett*, the partner in trade of *William Mallett*, the present applicant, died; that the extents mentioned in the affidavit, for which *fiats* had been granted in 1807, had not been proceeded in till the 13th *February* 1815, when two writs of extent were issued, on which the applicant was now in custody; they were both issued for the debt of $511 l. 19 s. 8 d.$, whereas there was only one debt to that amount found due, and that was joint. One writ, therefore, he contended, must be bad; and as they could not be so distinguished as to ascertain which was regular and which not, they must both be set aside.

Another objection was, that as there had been
no

no continuance of the original writ, those now issued were not properly founded on the *fiats* of 1807, and required, by analogy with judgments of more than a year old, affidavits of the existence of the debts and former proceedings, to revive them.

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MALLETT,
&c.

[*GRAHAM, Baron.* From the moment of the return of the inquisition it becomes a debt of record, against which no time runs, and therefore an extent may be sued out on it without a new *fiat*, the former not having been executed by taking the body of the defendant.]

Then there has been a partial execution of one of the writs, and some notice should have been taken of that levy, however small it may have been. It may be the fact, for any thing that appears, that the debt may have been satisfied in the mean time ; which is a strong reason why, in justice, a new *fiat* should have been considered necessary, founded on a sufficient affidavit. This is, besides (it should be considered), an immediate extent, and insolvency should be shown to warrant the extraordinary interference of the Crown. Other circumstances too may have arisen since the original *fiat*, which might have been pleaded to the extent ; and in fact, the death of one of the defendant's co-debtor has taken place subsequently, which ought necessarily to have been shown to preserve the congruity of the proceedings. The debt, as claimed now, does not correspond with that found by the inquisition, either with the joint debt in the sum sought, or the separate debt in a smaller sum, therefore the execution does not follow the

1815. the nature of the judgment; and nothing appears
 The KING on the writ to authorize the deviation from the
 v.
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 MALLETT,

&c.

Dauhcey, in opposition to the motion, admitted that there had been a mistake in issuing the two writs, but declared, that it had been the intention of the Crown to have withdrawn the last, which would have been done but for the present motion. But the debts having been found due, and *fiats* granted, he submitted that the custody was legal; and the question could only be as to which debt was to be levied. The objection of the proceeding being irregular, for want of fresh affidavit and new *fiat*, is totally unfounded.

Wood, Baron. That is certainly never necessary.

GRAHAM, Baron. Nor can the death of the co-debtor make any difference where the Crown is entitled, as here, to levy the whole debt on both or either.

THOMSON, Chief Baron. The first extent is regular, and the other may be disposed of in any way.

Per Curiam.

Motion refused.

Dor

1815.

DOE *ex dem.* WALKER *v.* ROE.

June 13.

Owen moved for judgment against the casual ejector, on an affidavit, that the deponent personally served *Charles Hicks*, representing himself as being in possession for *Richard Messiter*, Esq., then absent from his dwelling-house, and *James Upjohn*, *James Brackway*, and *William Pearce*, tenants in possession of the premises mentioned in the declaration: And that *Messiter* had subsequently acknowledged having been informed of the service on *Hicks*.

Service of declaration in ejectment in the name of the tenant, on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledges an appraisal of the service, sufficient to obtain judgment against the casual ejector.

The Court entertained much doubt whether the affidavit was sufficiently express in describing *Messiter* to be one of the tenants actually in possession, inasmuch as those words were referrible only to the three antecedent names. They held that it was in all cases necessary that that should plainly appear; but granted the present motion, as no objection was taken on that ground by *Messiter*, who had acknowledged the service on *Hicks*.

But it should appear clearly from the affidavit, that the person who was the object of such service, was tenant in possession.

D D

TANNER

1815.

Tuesday,
June 13.

TANNER v. NASH.

Description
of bail as 'of
his place of
business suffi-
cient.

RICHARDS moved to justify the defendant's bail: An affidavit was put in, that one of the bail was not to be found, as resident according to the bail-piece. It was said, that he had a counting house in the street of which he was described, but that he resided elsewhere: And *Owen* objected to such a description, as too vague, and as being evasive of inquiry into his circumstances.

The Court held, that the place of business of bail was a sufficient description; but gave time to justify till next day, to give the plaintiff an opportunity of making further inquiry in the mean time.

BRODENIK

1815.

BRODENIK v. TEED.

Same Day.

GIFFORD moved for an attachment against the defendant for not paying in a sum of money, pursuant to an order of the Court; at the same time apprising the Court that there had been no actual personal service of a copy of the rule; but submitting that what had been done was perhaps tantamount to such service. The attorney for the defendant had been served with a copy of the order, and the rule itself shown to the defendant at the time of making a personal demand of the money.

Per Curiam. The service of a copy of the rule is indispensable.

Motion refused.

Order of the Court, that a defendant pay a certain sum of money, being shown to the defendant at the time of making a personal demand of it, a copy of such order not having been personally served on the defendant himself, (although a copy had been previously served on his attorney) not sufficient to entitle the plaintiff to an attachment.

1815.

Wednesday,
June 14.

ROWNEY and others, executors, &c. v. J. W. DEAN.

An affidavit by an executor of a debt due to his testator, as appears from a statement made from the testator's books, by an accountant employed by the deponent, is insufficient to hold a defendant to bail.

DAUNCEY showed cause against a rule obtained by *Clarke*, this term, for delivering up the bail-bond given by the defendant in this case, to be cancelled on filing common bail, on an objection of insufficiency in the affidavit of debt, wherein it was sworn by *Rowney*, that the defendant was indebted to the plaintiffs, as executors, &c., "as appears to this deponent, from a statement made from the books and accounts of the said *Matthew Dean*, deceased, by *William Kay*, an accountant employed by this deponent to investigate the same, as this deponent verily believes;" submitting that the plaintiff, in his character of executor, should be permitted to depose to a debt due to his testator in the most cautious manner. But the Court ruled, that an affidavit in such terms was insufficient to hold a defendant to bail,

Rule absolute.

ATTORNEY

1815.

ATTORNEY GENERAL v. FADDEN.

Wednesday,
June 14.

15 (A.D. 471)

THE defendant, against whom an information had been filed for importing prohibited goods, was apprehended by *capias*, and committed to *Lancaster Castle*, where he now remained for want of bail. The information being about to be tried at the ensuing sittings, and the defendant having instructed his solicitor, that the person who had actually committed the offence imputed to him had assumed his name, and that the question would be one of mere identity; an affidavit to that effect was prepared for the purpose of grounding an application to the Court for a *habeas corpus*, under which the defendant might be brought up, to be present at the trial of the cause, that he might avail himself of that point in his case, averring that he could not otherwise safely proceed in his defence. The Court granted a rule to show cause.

In case of a question of identity of the person of a defendant to an information who is in prison, the Court will grant a *habeas corpus* to bring him up to be present at the trial at his own expense, and paying the costs.

Campbell, yesterday moved to make the rule absolute; and being a very novel application, the Court desired it might be mentioned again, and that in the mean time the practice of the Court of *King's Bench* might be inquired of. It was mentioned again this day, and a certificate of the clerk of the rules was furnished, from which it appeared, that similar applications had been made in that Court, and had been granted. It was also stated, that notice had been given of the intended motion.

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v.
FADDEN.

The COURT, under the circumstances, and on the authority of the certificate of the precedent in the Court of *King's Bench*, granted the application, on condition of the defendant being brought up on a day certain, and paying the costs of being brought up and remanded, intimating, that the writ should be in form of the *habeas corpus ad testificandum*.

Rule absolute.

Wednesday,
June 14.

HALLILEY v. NICHOLSON.

Parol evidence to explain an imperfectly-worded written contract, even where some parts of it were difficult to be understood alone, not admissible; and that although the chief question in the cause was the nature of the contract which had been rendered doubtful, by partial and incomplete alteration, and which there-

THE plaintiff in this cause was a woolstapler in *Yorkshire*; the defendants were merchants at *Liverpool*. It was a special action on the case for not delivering a quantity of wool, in pursuance of a contract of sale, and was tried at the last *Lancaster* Spring Assizes, before Mr. Justice *Le Blanc*, when a verdict was found for the plaintiff; subject to an award as to the amount of damages.

It appeared in evidence, that *Goodwin* was commissioned, by the plaintiff, to buy a large quantity of wool on his account, and that he in consequence contracted with the defendants to furnish a certain quantity at a stipulated price: *Memoranda* of the terms of the contract were noted in pencil by *Mowm*, before seemed to require to be supplied and perfected by some such additional words as the evidence rejected would have furnished; and, although it contained dubious words, involving it in uncertainty as to whether it purported to be a sale of particular merchandise to arrive by a certain vessel, or of such merchandise generally, whenever the contracting party should receive sufficient to supply the purchaser with the quantity.

the defendants general broker at the time; from which he made in his contract-book, at his counting-house, the following entries:

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v.
NICHOLSON.

Liverpool, 9th August, 1813.

Jn^r Halliley, Jun.
per Mr. Goodwin,
290 Bales of wool.

To sales per Elizabeth.
a/c Nicholson and Mosman.

Laid a 11/6 payment $\frac{1}{2}$ at 3 months, allowing 1 month interest
White a 13/6 $\frac{1}{2}$ at 4 months.
2 lb. allowed dft. but no allowance for packages.

Immediately under was the following note, which was the subject of the present question, in these terms;

John Halliley, Jun'
p^r Goodwin.

to arrive
To sales p^r Elizabeth
a/c Nicholson and Co.

290 Bales wool, more or less, at 11/6 and 13/6.
Payment, acceptance down at 4 months.
2 lb. for dft., the packages included as above.

The first contract was duly performed, but on the 20th of *August* the defendants informed the plaintiff's agent, that the cargo which they had expected from *Scotland*, with which they had intended to furnish the plaintiff, had been shipped for another purchaser before their letter arrived; and that they would endeavour to supply it from other correspondents in *Scotland*; and requested reasonable time.—In *September* they delivered part of the wool, which they said was all they could procure; but that, in point of fact, more wool came to the defendants hands than would have been sufficient

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NICHOLSON.

ficient to complete his contract.—Wool having in the mean time considerably advanced in price, and being then very scarce, the plaintiff brought the present action, which the defendants resisted, on the ground that the contract had been for the sale, on arrival of a cargo expected by a particular vessel, and as that vessel did not arrive, they were discharged from the contract.

Scarlett this day obtained a rule for a new trial, on the ground that the defendants had not been permitted at *Nisi Prius*, to give evidence of the nature of the contract entered into by them with the plaintiffs; from which it would have appeared, that the defendants had not bound themselves to furnish a certain quantity of wool, generally, but that they had specially contracted for the sale of a certain specific cargo, then to arrive by a particular vessel, and that such explanatory evidence was admissible, under the special circumstances, and ought to have been received.

It was contended, that the note or memorandum of the contract in question was in itself ambiguous and uncertain, and stood in need of explanation, for that without it, it was absolutely unintelligible; and it had become so by an erasure made by the defendant's broker's partner, in whose hand writing also it had been altered to what it now appeared to be; that it was not signed, or otherwise acknowledged by the plaintiff, or his agent, and differed from the entry in the defendant's book; and there was therefore considerable doubt whether it could be shown to

to be the note of a contract entered into reciprocally between the parties.

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It was said, that the defendant, if his witnesses had been examined to that point, could have shown that the word *Elizabeth*, as it originally stood, was meant for the name of the ship by which the wool bargained for was then expected to arrive, and so it was entered in the defendant's book; but discovering afterwards that they had made a mistake in the name of the vessel, the wool being in fact to be brought by another (the *Isabella*), it was altered imperfectly as it now appeared*.

The defendant's case, therefore, turned on the construction to be put on the note of the contract, and depended on the question, whether the bargain was to furnish a certain quantity of wool generally, and in all events, or to transfer to the plaintiff a specific cargo consigned to the defendants, and to arrive by an expected ship; and on that question the note of the contract itself, unexplained by other testimony, afforded no intrinsic evidence; this was therefore contended to be so particular a case as to admit of a deviation from the usual rule.

Parke, Topping, and Richardson, now showed cause. They placed their main reliance on the rule of evidence on the point, as laid down in all the decisions on the subject, and acted on in the

* Affidavits to prove these circumstances were produced, but rejected by the Court. Vide *Ante*, p. 406.

direction

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April 28.

direction of the Judge at *Nisi Prius*, who held, that sufficient might be collected from the note of the contract, to show that it was a contract to sell so much wool when the quantity should arrive generally; and that it could not therefore be explained by parol testimony to have been meant to be a sale of a cargo expected by any certain vessel; observing, that if a factor agree to sell goods on arrival, at a given price, he must deliver them according to his contract, whether the price be higher or lower at that time, or be responsible to the purchaser.—They remarked, that the defendants had admitted, by their subsequent conduct, that they had not considered the contract to be for the sale of a specific cargo, but of such a quantity of wool generally, for they had since actually delivered 51 bags of wool to the plaintiffs, in part performance of this very contract, and had solicited a reasonable time to furnish the remainder, as appeared by their letters, which were produced on the trial. They denied the existence of such ambiguity in the memorandum as required explanation; and insisted, that it was sufficiently explicit to warrant the construction of a general contract to sell, on arrival, a certain quantity at a certain price; and described the present motion as an attempt to narrow the terms of general contract in writing by parol evidence, which could not be done without overthrowing the established rule.

Scarlett and Williams, in reply, admitted, that as a general rule, the inadmissibility of parol evidence to qualify a written agreement was now established; but

but strongly urged, that the present case should be considered an exception to that rule, because it was one most particularly distinguishable from the cases on which it had been built. In this instance such evidence was absolutely necessary to render this imperfect note complete, and the contract intelligible, and to supply the omission which evidently followed the word *per*, of whatever that might be which was obviously wanting there to express the intention of the parties. Had such evidence been admitted, the defendant was prepared to have shown that he had contracted for the sale of one specific cargo of an expected vessel, the *Isabella*, which, in fact, never did arrive; and it would then have been incumbent on the plaintiff to have proved the arrival of the ship. It is an ambiguous, doubtful memorandum; and the ambiguity consists in the impossibility of ascertaining by it, whether it refers to an arrival of wool by a particular vessel, or an arrival of any wool generally; if any thing can be collected from the terms of it, it is rather in favour of its being a specific contract;—that would alone be a sufficient reason for admitting explanatory evidence. How otherwise is the word “per” standing singly to be supplied? Why are the words “more or less” used, unless the contract related to some specific cargo, the quantity of which could not then be precisely ascertained? Those words introduced in a general contract would be an absurdity. Then the reference to the preceding contract, and the time and mode of arrival, all require explanation; and without it the contract is nugatory and inefficient.

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And

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And even while the defendant's extrinsic parol testimony is rejected, to show that the agreement was specific, the plaintiff would make use of the defendant's letters and acts to prove that the contract was a general one, thereby admitting its need of explanation:—It was, in fact, the sole question in the cause, for the merits could only turn on the solution of that difficulty.

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THOMSON, *Chief Baron*, now gave judgment; and having gone at length into the facts of the case, and commented on the conduct of the parties: his Lordship adverted to the grounds on which the application for a new trial had been made, and expressed concurrence with the opinion held by Mr. Justice *Le Blanc* on the trial; that the contract spoke sufficiently for itself to exclude evidence to alter or explain it, although it might be very difficult to account for the introduction of the words, "more or less." On the whole, it seems that this must be construed to be a general contract to furnish the wool whenever, and however, it should arrive; and any evidence offered to show that it related to the cargo of a particular vessel expected at the time of the contract, was properly rejected. Therefore the opinion of the Court is, that there is no ground in this case for granting a new trial.

Rule discharged.

END OF TRINITY TERM.

SITTINGS AFTER TRINITY TERM.

55 GEORGE III.

GRAYS-INN HALL.

1815.

ATTORNEY GENERAL v. LADY LOUISA
MANNERS and others.Saturday,
May 6.

1 May 1815 (272.)

A VERDICT was taken for the Crown when this information came on at the sittings after last *Trinity Term*, for 1,040*l.*, the amount of the legacy duty on a bequest of 13,000*l.*, under the 48 *Geo. 3*, ch. 149, sch. 3, subject to the opinion of the Court on the following case:

'Lord *William Manners* by his will, dated the 8th of *July 1771*, gave and bequeathed the sum of 13,000*l.* to his executor, in trust, to place the same out at interest in the Funds, or on real security, and to pay the dividends or proceeds arising therefrom unto his son, or reputed son, the Rev. *Thomas Manners*, clerk, for his life; and after his decease

A legacy (bequeathed by will of a person dying in 1771, of a sum of money to an executor to pay the interest thereon to testator's natural child for his life, and on his death to pay over the principal to his children, the interest of which had accordingly been regularly paid to the legatee for life up to his

death, which happened in 1812, his two sons (his only children) having died long before that time, and previously disposed of their interest in the bequest) held to be within the 48 *Geo. 3*, ch. 149, sched. 3, as being a legacy given by will of a person dying before the 5th of April, 1805, and *not paid, retained, satisfied, or discharged*, till after the 10th of October, 1808, and consequently liable (as to the interest taken by the representatives of the children) to the duty of 8 *per cent.* imposed by that statute on such legacies, when given for the benefit of strangers in blood to the testator; and that, notwithstanding the principal had, in 1794, been invested in the Funds by the executors (in their own names) to answer the purposes of the will.

testator

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testator directed that one moiety thereof should be paid to the eldest son of the said Reverend *Thomas Manners*, and the other moiety thereof to the younger children of the said *Thomas Manners*.

'The said *Thomas Manners* was the illegitimate child of the said Lord *William Manners*. The testator died shortly after the execution of the said will, without altering or revoking the same, and *John Manners*, Esq., the executor therein named, proved the same in the prerogative Court of the *Archbishop of Canterbury*. Mr. *John Manners*, the executor, did not place out the 13,000*l.* in the Funds, but retained it in his own hands as executor, and regularly paid the interest thereof as it became due to the Reverend *Thomas Manners*, up to the time of his the said *John Manners*' death, which happened about the year 1793.'

'In the year 1794 the Reverend *Thomas Manners*, and his two only children, applied to the present defendants, being the executors of *John Manners*, Lord *William*'s said executor, to have the money invested in the Funds, who complied with the request, and the 13,000*l.* was in consequence of such application shortly afterwards, in the year 1794, invested in the defendants names, in the five *per Cents.*, which then were at the price or value of 103*l. per Cent.*'

'The Reverend *Thomas Manners*' eldest child, whose name was *William*, was then married, and had a family, on whom the Reverend *Thomas Manners* settled 200*l. per annum* during the joint lives

lives of himself and his said son; Mr. *William Manners* died in the year 1800, when the 200*l. per annum* reverted to the Reverend *Thomas Manners*.

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‘ The Reverend *Thomas Manners* made a similar provision for his youngest child, named *John*, who enjoyed it for some years, and died in the lifetime of his father, whereby that provision reverted also to the Reverend *Thomas Manners*; Mr. *William Manners* by his will, dated 22nd *January* 1791, gave his moiety of the principal sum of 13,000*l.* equally among his several children, subject to the life estate and interest of his father, the Rev. *Thomas Manners*, therein; Mr. *John Manners*, on the 28th of *November* 1783, made a settlement of his moiety thereof, which he took as the only younger child of the Rev. *Thomas Manners*, and the same is thereby directed, after the decease of the said *Thomas Manners*, with the consent of the said *John Manners*, and *Ann* his then intended wife, and now widow, or the survivor of them, to be laid out in the purchase of lands, to be settled to the uses following; namely, to the use of himself for life; after his decease to his wife for life; and after the decease of the survivor of said *John Manners* and his wife, to the use of all their children as therein mentioned. Mr. *John Manners* and the Reverend *Thomas Manners* having both lately departed this life, the said *Thomas Manners* having survived; and dying in the month of *December* 1812; Mrs. *Manners*, the widow of Mr. *John Manners*, is become entitled to the interest of her late husband’s moiety for her life, or the rents of the lands, when a purchase shall be made under the settlement; and the children of

the

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the late Mr. *William Manners*, namely, *Thomas, Jane, Theodore, and Harber*, who are of age, claimed their respective portions of their father's moiety of the legacy of 13,000*l.* from the defendants, and were paid the same in *July 1813*, by sale of part of the 12,530*l. 2s. 4d.* stock purchased in 1794 by the defendants; the remainder still stands in their names, who retain the same as executors of *John Manners*, the executor of Lord *William Manners*, for the persons entitled thereto, under the above circumstances.'

Nolan, on the part of the Crown, submitted, that the question depended wholly on the construction of the statute, on which the information was founded; and was, in effect, whether, under the circumstances of this case, the legacy was given by the will of a person dying before the 5th *April 1805*, and had been paid, delivered, retained, satisfied, or discharged, after the 10th *October 1808**. And he contended, that if the legacy did not vest till after

* The words of the statute, on which the question arose, are, 'For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument, of any person who died before or upon the 5th *April 1805*, out of his or her personal or movable estate, and which shall be paid, delivered, retained, satisfied or discharged, after the 10th day of *October 1808*.

'And where any such legacy or residue, or share of such residue, shall have been given, or have devolved to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of eight pounds *per centum* on the amount of value thereof.'

the

the death of *Thomas Manners*, it came within the words of the clause in the act; and he not dying till *December 1812*, the legacy could not be paid or payable till after *October 1808*. For this is not a bequest to children by any particular wife, but to all the children he might have generally; so that if there were a son by one venter, and a son by another, on the death of the first, in his father's lifetime, the other would become entitled, as his eldest son, to the moiety bequeathed to such son, and therefore it could not vest absolutely till after the death of *Thomas Manners*, when alone it could be ascertained who would be ultimately entitled to take it.

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[The Court here interposed a question, whether there were children of *Thomas Manners* in *esse* at the time of the death of Lord *William Manners*, to rid the argument of any difficulty as to the eldest son being entitled to take by purchase: to which it was answered, that *Thomas Manners* had then two children, and had afterwards had no more.]

This is not the case of an immediate bequest of the principal to *Thomas Manners*, but to trustees, who are directed to pay over the interest and profits to him during his life, with a final disposition of the principal after his death among his children; so that, if others had been born after the death of Lord *William Manners*, even though the issue of a subsequent marriage, they would have been entitled to come in for their proportionate shares.

But whether the legacy vested or not, that fact
E E either

1815. either way would not materially vary this case, as in all events it was not, nor could be actually, retained or discharged till after *October 1808*.

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[*WOOD, Baron.* Was it not retained for the benefit of the *cestui que* trust on the death of the testator?]

It was so, but that retainer continued till the final discharge of the legacy, which could not completely take place till after the death of *Thomas Manners*. The object of the act was to require the duty to be paid on the beneficial receipt of the legacy, if received after *October 1808*, without regard to the period when the will was made, or took effect; however remote that might be previous to *April 1805*: and that obviates all argument arising from an assumption of hardship in the case. Had the legacy duty still continued to be paid by means of the stamp on the receipt, as it was under the former acts antecedent to 36 *Geo. 3*, it would have been payable only on the actual payment and discharge. The act was retrospective, as to the death of the testator, but prospective as to the payment of the legacy. Now this legacy cannot be said to have been paid till after 1808. The executors put it out, it is true, but it was in their own names, preserving a control over it, in compliance with the trusts of the will, and remaining liable to make good deficiencies, if any should arise. The investment in 1794 could not be considered such a payment over of the legacy as to preclude any children of *Thomas Manners*, who might have been born after that time,

time, from their share in it; nor would that have been an answer to their claim; therefore the duty does not attach on the retaining merely, but on the effectual payment of the legacy, otherwise the revenue would suffer, wherever an executor by collusion should retain a legacy before 1805, which he would not be called on to pay till after October 1808.

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KNOWLYS, *Common Serjeant*, for the defendant, insisted, that on the construction of the act the demand of the duties sought by the information could not be sustained in point of law.

It is by no means immaterial, but on the contrary, an important and essential consideration in this case, whether this legacy was or was not vested: —That this is a vested legacy, under the bequest in this will, all the determinations on that point clearly establish, from the 31st *Charles 2.* (a) to the present time.

[*Per Curiam.* That point will not be disputed.]

There can be no doubt that it vested in *William Manners*, the eldest Son of *Thomas Manners*, as to one moiety, on the death of the original testator; and he had then a right to see that it was properly applied, according to his interest under the will. Till the year 1794 the executors had not complied with the directions of the will, as far as related to this legacy

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being laid out; but then the present defendants, who are the executors of the original executor, vest it in the Funds, on a request to do so, in trust for the persons interested; thus performing completely the trust of the will; and at that time there was certainly no existing duty on this legacy. The three statutes, anterior to that time, which had imposed any duty on legacies, had done so through the medium of the receipt; those were the 20th *Geo. 3.*, c. 28; 23 *Geo. 3.*, ch. 58; and 29 *Geo. 3.*, ch. 51; and that duty the executor was not compellable to pay, unless he took a receipt. So it was decided in *Green v. Croft* (b); and therefore it did not of necessity follow that the legacy was in all cases to be diminished by that duty. The 36th *Geo. 3.*, applies only to legacies given by will of any person dying after that time, and therefore could not affect a legacy retained in 1794. *William Manners* died in 1800, having left his moiety by will, dated in 1791, to his three children; and no act imposing a duty on legacies passed till four years afterwards; therefore, at that time, the executors were not trustees of *Thomas Manners*, but were then, in point of fact, trustees of the children of *William Manners*, the last testator; when, if any duty had been payable, it would have been only that which was to be paid by a child receiving a legacy from his parent, who had a vested interest in the thing bequeathed; and they must be considered as then retaining it for them, and not for strangers in blood. When the 48 *Geo. 3.* passed, they had for a long

(b) 2 H. Bl. 30.

time

time retained this legacy in trust for the benefit of the children, at least as to this vested moiety, so left by the will of *William Manners*, and which could not then be any longer considered as part of the general property of the original testator.

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It has been said, that if the legacy duty does not attach in this instance, the act can have no meaning as to the clause which has been considered applicable to this case; but the words of that clause may be well satisfied by applying them to cases where the executor may not have reduced the means of satisfying the legacies into his possession till after *October 1808*; and that is the most probable object of the act; otherwise it would be liable to all the objections of an *ex post facto* law, diminishing the property of such persons only as should be accidentally in the peculiar situation of the present legatees. The word retained, therefore, must be used with reference to assets coming to the executors hands after the passing of that act. If it were a question between the legatees, and executors who should refuse to pay them without deducting the property-tax, the legatee might well say that the act imposing that tax had not passed when they were entitled to the legacy, and therefore they were not liable to pay it. If *William Manners* had sold it, as he had a right to do, the executors would not then have been called on to pay it over as a legacy. Retaining, means nothing more than keeping it in their hands when received, and the executors had therefore received and retained it before the 48 *Geo. 3.*

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The moiety of *John* stands on a different footing; he had made a settlement of his moiety; and the persons claiming under him are not legatees, but persons entitled to dividends of a settled estate, under a trust-deed of a date as remote as 1783, which is totally inconsistent with a retaining by the executors, for the benefit of persons then interested. They retain it as trustees under the deed executed twenty-five years before the passing of this Act.

The statute applies to legacies discharged after *October, 1808*. Now this legacy was discharged in 1794, when it was vested in the Funds, upon the trusts of the will. Let it be supposed, by way of argument, that the Bank had failed; in that case the investment of the legacy, by the request of the legatees, would have discharged the executors, who would have become *functi officio*, and exonerated the rest of the estate of Lord *William Manners*, the original testator, from the claims of the legatees. If therefore the legacies contemplated by the Act, as being retained or discharged before the 10th *October, 1808*, are to be free from the duty imposed by it, the bequests, under the present will, are not liable to the duties sought by the information.

Nolan, in reply, contended, that whether the legacy vested in interest or not, would make no difference in this case, as there was clearly not a vesting in possession. The case of *Green v. Croft*, decided merely that the want of a receipt was no ground for withholding the payment of a legacy, and that

that because the executor was entitled to deduct it out of the sum bequeathed. The mere appropriation of a fund to the future satisfaction of a legacy can not be considered to be a discharge of it, which alone can bring it within the statute, for it must be still under the control of the executors. As to the argument of the will of *William Manners*, and the settlement by *John Manners*, changing the nature of the property, and the course of its disposition, as also the case put of a sale of the legacy by either of them to a second person, if that were a mean of evading the duties, it would open a door to the practice of frauds on the revenue, by the adoption of such distinctions. But whether it be ultimately to be paid to the original legatee, or to his devisee, or assignee, it must be payable out of Lord *William Manners*' funds, and no variation of its disposition can enure to defeat the right of the Crown. The words of the act would not be satisfied by applying them in construction to the case of assets, coming to the executors hands after 1805; for the statute says nothing of assets, and if they should prove insufficient, the legacies must abate rateably *pro tanto*; but, at all events, the act does not contemplate the original and primary retainer by the executors, but the effecting the object of that retainer by applying it in discharge of the legacy; for one and the same retainer may, in point of time, be made both before and after 1805.

[*THOMSON, Chief Baron.* You must, according to this information, show it had not begun to be retained.]

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If the act adverted to the period when the legacy was originally retained, the words of the clause would be inoperative, because the property of the testator becomes immediately on his death the property of his executor, and the act of retainer is an act of continuance, commencing with the appropriation, and concluding with the application of the property destined to satisfy the legacy.

[*GRAHAM, Baron.* If there had been a penalty imposed on executors not retaining within a certain time, would the investment of the 13,000*l.* in the Funds, in this case, for the benefit of the legatees, have been construed to be such a retainer as would exonerate the executor? For, if so, that must be considered as the time when the legacy was retained. But it continues to be retained till it is actually paid; and it cannot be said to be a complete retainer for the benefit of the legatee, till that time. The object of the Legislature was to equalize the duty among all persons deriving a benefit from legacies paid and received after 1808, without regard to the date of the will.]

THOMSON, Chief Baron. The argument goes to show, that this being a duty on the body of the legacy, it was liable in the lifetime of *Thomas Manners*, and each should have borne a proportion.

Cur. ado. vult.

Saturday,
July 1.

THOMSON, Chief Baron, now delivered the opinion of the Court. His Lordship commenced by

a statement of the case at length; the question which arose on it for the opinion of the Court; and its dependance on the application of the words of the statute (which he read) to the circumstances; and finally proceeded to pronounce the following result of their deliberations:

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There can be no doubt that this is the case of a legacy given by the will of a person dying before the 5th of *April*, 1805, for the testator died so long ago as the year 1771; but the sole question arises on the latter words of the clause, and is, whether this is a legacy which may be said to have been paid, delivered, retained, satisfied, or discharged; after the 10th of *October*, 1808. The devise in question is of money, to be placed out at interest by the executor, the dividends to be paid to his natural son for life, and after his death the principal to be divided into moieties; one whereof was to be paid to the eldest son of that natural son, *Thomas Manners*, and the other to his younger children.

In point of fact, therefore, it remained matter of uncertainty till after the death of *Thomas Manners*, who would be entitled to receive the legacy; for it was not given to the children of *Thomas Manners* then living, but one moiety was bequeathed to his eldest son, and the other to his younger children. At the time of making the will, and at the death of the testator, there were only two children of *Thomas Manners* living. This bequest, therefore, would certainly vest in all the children of *Thomas Manners*, who should

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should be living at the time of the testator's death, for it is not a bequest of a moiety to his eldest son then living, but to the eldest son, and of the other moiety to the younger children. Now, although their separate shares vested in all the children of *Thomas Manners*, living at the death of Lord *William Manners*, they were still liable to open and let in any other children coming in *esse* during the life of the father, the bequest being to the younger children, and not to the younger children then living. The consequence of this construction is, that the capital could not be paid till the death of *Thomas Manners*, because, as he was tenant for life, it would be uncertain till his death who would be entitled to it, as that depended on what children he should leave at that time. In this situation, *John Manners*, the executor of Lord *William Manners*, does nothing in the shape of appropriating the legacy which is given to him as executor, to be set apart to answer the purposes of the testator's will. He retains it, indeed, as it appears, in his own hands, but it is never divided from the bulk of his personal estate;—he keeps it in this way, and pays the interest to *Thomas Manners*, the person entitled to it under the will, during his (the executor's) life, up to the period of his death. After that time, which was in the year 1773, the present defendants, who are the executors of *John Manners*, and consequently are now also executors and personal representatives of Lord *William Manners*, for the first time, do what is something like an appropriation of this legacy; but that was merely laying it out and investing it in the

Funds,

Funds, in their own names, it being uncertain who would become absolutely entitled to it till the death of *Thomas Manners*. That event has now happened, and on that it appears that his two children, *Thomas* and *William*, were the only persons who ever became entitled to the principal of the legacy; and they could not, till that time, have known what would have been the amount of their shares. They had each disposed of their interest: *William*, by his will, in 1791, having devised his moiety to his children; and *John* had settled his moiety on his wife for life, with remainder to his children, with a direction that it should be laid out in land, to be limited to those uses.

Now, as to the question of this being a legacy retained after the 10th of *October*, 1808: It is in fact actually retained at this moment, and retained for the benefit of those legatees who became entitled to it on the death of *Thomas Manners*, that is, for the benefit of their representatives; and we are of opinion that it comes precisely within the description in the Act of the 48th *Geo. 3*, of 'a legacy which has been retained after the 10th of *October*, 1808, for the benefit of persons, strangers in blood' to the testator, and being given by a will dated so far back, the testator having died in the year 1771, it is subject to the duty demanded by this information. Therefore, we consider the sum claimed, of 1,040*l.* to be due to his Majesty; and that there must be

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Judgment for the Crown.

The

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10 Aug. 186

Friday,
21 April

The ATTORNEY GENERAL v. HOLFORD.

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A bequest of real property to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid (if necessary) of the rest of his property, in discharge of his pecuniary legacies, given either by his will, or any codicil thereto, is liable to the legacy-duty imposed by the 48 Geo. 3, ch. 149, although the residuary legatee took the property in *statu quo*, and the trustees did not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary.

ON the trial of this information, at the Sittings after Trinity Term, 1814, a verdict was taken for the Crown, subject to the opinion of the Court, on the following case :

George Bogg, Esq. in the said information mentioned, made his will in writing, dated 15th April, 1800, duly attested to pass real estates: and thereby gave, devised, and bequeathed to the said *John Josiah Holford*, and *John Richard Baker*, and to the survivor, and the heirs of the survivor, all his estate, freehold, leasehold, or otherwise denominated, consisting of a share, called a King's Share in the New River Water-Works, purchased of *William Cooper Keating, Esq.* with the land-tax thereon, by him redeemed, and all the premises, with the appurtenances whatsoever thereto belonging: upon trust, as soon as possible after his decease, to sell the same by public auction; and the testator willed that the profits arising therefrom should be deemed part of the residue of his estate thereafter disposed of, or go in aid, if necessary, of the rest of his property, in discharge of his pecuniary legacies, either by his will, or any codicil thereto. The said share in the New River Water-

The subject of such a bequest would be considered, in equity, as personal property, and would go, in case of the legatee's death, to personal representatives.

Works

Works was freehold property, of which the testator died possessed in fee-simple. The said testator, after giving various legacies by his said will, gave and devised all the residue of his estate and effects whatsoever and wheresoever, unto the said *John Josiah Holford*, his heirs, executors, administrators, and assigns, for ever; and of his said will appointed the said *John Josiah Holford, John Richard Baker, and James Abel*, his executors.'

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'The said testator, after making his said will in manner aforesaid, died on the 17th day of *January, 1813*, without having revoked the same, and the said executors afterwards, to wit, on the 28th day of *January, 1813*, duly proved the said will, and were enabled to pay and satisfy all his debts and legacies out of his personal estate alone, without having recourse to a sale of the said New River Share, devised by his will as aforesaid, or of any other part of his real property, the surplus of the said testator's personal estate being very considerable; and the said New River Share is of the value not exceeding 5,000*l.* and the said executors have not paid or discharged any legacy-duty to his Majesty, in respect of the same; and the said *John Josiah Holford* is now possessed thereof, as part of the residue of the estate of the said testator, without any duty having been paid for the same.'

'That the said *John Josiah Holford* is a stranger in blood to the said testator.'

'The legacy-duty payable to his said Majesty, in respect

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HOLROYD.

respect of the said New River Share, if any be payable thereon, amounts to the sum of 500*l.*.'

'The question for the opinion of the Court was, whether the legacy-duty of 10*l.* per cent. granted by the 48 Geo. 3, chap. 149, schedule 3, upon any legacy or residue given for the benefit of a stranger in blood to the deceased, should not be paid by the said defendants, upon the said New River Share, under the circumstances of this case: and the verdict to stand, or be entered for defendant, according to the decision.'

April 21.
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Notm. for the Crown, stated, that the present information proceeded on the 48 Geo. 3. ch. 149, wherein, by schedule 3, it is enacted, that "for the " clear residue (when given to one person) and for " every share of the clear residue (when given to " two or more persons) of the monies to arise " from the sale, mortgage, or other disposition of " any real or heritable estate, directed to be sold, " mortgaged, or otherwise disposed of, by any will " or testamentary instrument, of any person who " shall have died after the 5th day of April, 1805, " (after deducting debts, funeral expenses, legacies, " and other charges first made payable thereout, if " any) where such residue, or share of residue, shall " amount to 20*l.* or upwards; and where the same " shall be paid, retained, or discharged, after " the 10th day of October, 1808; and where any " such legacy or residue, or share of such legacy " or residue, shall have been given, or have devolved " to or for the benefit of any stranger in blood to " the

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"the deceased, a duty shall be paid at and after the rate of 10 per cent." and that it would depend on the question, whether the object of the bequest were to be considered as personal or real estate. Now by this will the New River Share is not directed to be sold conditionally, and only in the event of the personal fund being found insufficient to discharge debts and legacies; but it is a positive direction that it shall be actually sold, and that the proceeds shall be deemed part of the residue of his estate, which brings the bequest precisely within the statute imposing the duty. If there had existed an unsatisfied debt, however small, and the property had been sold, the remainder would have been liable to the duty, as part of the residue bequeathed; or if the share had been given to two it would not have been competent to either to take it as real property, but it must have been sold, and the proceeds divided. The residuary legatee might have compelled the trustees to sell the property, which is a criterion of its being personal estate; or if he had died before the trusts of the will had been performed, a court of equity would have considered it to be personal property, and would have decreed it to go to his personal representatives, *Fletcher v. Ashburner* (a). An interest vested in the Crown, under this will, on the death of the testator, which could be no more divested by the subsequent conduct of the legatee than the right of a creditor or a personal representative.

Bowen, for the defendant, contended that no duty could be considered as payable on account of

(a) 1 Br. Ch. Ca. App. 497.

the

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the property in question, until it should be converted into money ; and that under this will, which must be expounded by the common rules of construction of wills, no person but the residuary legatee, or those whose interests would have been interfered with, by considering it as personal property, could have compelled a sale of the share. By the will it is given to trustees, not to executors ; and the testator clearly intended that if it should not be necessary to sell it, to go in aid of his personal estate ; it might be transmissible in its original nature, and the executors being enabled to satisfy all claims out of the personal estate, had no right to interfere with this property bequeathed to the residuary legatee. It is decided by case after case, that a real estate devised does not change its nature, unless it be compellable to be sold, but no claim was made on this property (b) ; and it has gone uncharged under the devise. In the case of *Chitty v. Parker* (c), the Lord Chancellor refused to make an order in favor of the next of kin against the heir, where the testatrix had used strong words, devising " all her real estate to be sold, and all her " estate to be converted into money," but the purposes of the will having been otherwise satisfied, the real property was not sold ; and his lordship said, " If there is a single person existing who has a " right by gift from her to any part of it, or the use " of it, that person has a right to apply to have it " converted into money ;" but as there was no person having such claim, he denied the right of the next of kin to have it converted against the heir.

(b) 1 Ves. 44.

(c) 2 Ves. 271.

[GRAHAM,

[*GRAHAM, Baron.* In case of the legatee's death, would his heir or personal representative be entitled to this property?]

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According to the cases his heir would be entitled, *Randall v. Bookey* (*d*), and *Roper* and *Radcliffe* (*e*), the rule being, that if there be a devise of a real estate to be sold, if not sold, it shall go as real property. The Crown, in this case, cannot be said to have such an interest under this will as to be enabled to compel a sale of the property in question. In *Green v. Croft* (*f*), Lord *Loughborough* held, that though legacies on land were chargeable, yet that a devise of land, or of interest in land, was not; and though that case was before the statute, the reasoning is applicable here.

The schedule of the 48th Geo. 3, speaks of the clear residue of the monies arising from the sale; where such residue, or share of residue, shall amount to 20*l.* or upwards, (omitting "or be of the value," as introduced in the charge on legacies arising out of personal estate) and where the same shall be paid, satisfied, or discharged; not where the same shall be granted or released, or using such words. Now until a sale the clear residue cannot have been ascertained, nor can any money have arisen to entitle the Crown to a duty. The title of the Act too describes the duties, as "on legacies and successions to personal estate upon intestacies then payable

(d) 2 Vern. 425. (e) 9 Mod. 171. (f) 2 H. Bl. 3.
F F " in

1815. ATTORNEY GENERAL v. HOLFOORD. "in *Great Britain*." So that the schedule applies merely to monies, and whatever the testator's intention might have been, no duties can attach till that intention be effectuated.

Nolan, in reply. If it were absolutely necessary that in all such cases the estates directed to be sold were to be actually reduced into money, a compendious mode would be furnished of getting rid of the duty in all similar bequests, by collusion between the trustees and executors; or the legatees might agree to a partition of the estate without changing its nature: But, in fact, the estate so bequeathed and directed to be sold, must, whether sold or not, be considered as sold, in favour of any claim on it. The claim of the Crown is as valid as that of a creditor; and the Attorney General might file a bill to enforce a sale, which is an answer to the cases that have been cited. The Act only looks to the satisfaction of the legacy, by whatever means that be brought about; and it is on that satisfaction of the legacy that the duty is payable, the right to which vested in the Crown on the death of the testator; whose express directions that the estate should be sold cannot be contravened by the acts of the legatees.

[*THOMSON, Chief Baron.* Suppose a sum of money were bequeathed to be laid out in land, is such a legacy provided for by the Act? That would certainly be deemed in equity land, and not money; and if you go on equitable construction you must admit

admit that also to prevail: under this devise it appears that the debts are not chargeable on this property, but only the legacies. The true question will be, Whether this, as real property, is liable to the duties, not having been sold according to the directions of the will? The act does not contemplate the cases alone of estates being necessarily sold, but only where they are directed to be sold to pay debts, if any. There is certainly much in what has been said on the effect of an information being filed to compel a sale.

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Cur. adv. vult.

THOMSON, *Chief Baron* [having stated the question, and gone through the case and most material arguments]. This is not a bequest of the property in question, directing it to be sold with a view solely to the payment of debts, but it is directed to be sold in all events, and to be turned into money. The profits arising therefrom were, by the will, to go in aid of the rest of his property, if necessary, in discharge of his pecuniary legacies; but it is not directed to be sold for that purpose merely, but generally to be sold, and the money to go as residue of his personal estate. Now all the residue of the testator's estate goes to *Holford*, the defendant, a stranger in blood; and this property would be considered in Equity as sold, although it might not be in fact sold; and supposing him to have died before election, it would have gone to his personal representatives; and shall it be said, that

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by not selling it according to the directions of the will he shall be enabled to intercept the duty? He has, it is true, a right to take it in its original state, as between himself and the executors; but he must not, by so doing, be permitted to evade the duty to which, if sold, it would have been liable; and it must be considered as having been actually sold by the executors, and that the money arising from the sale had been by them paid over to the devisee.

It appears to the Court therefore, that this bequest is within the 48th *Geo. 3*, and that the duty is payable by the defendant, according to the information, and we must confirm the

Judgment for the Crown.

Friday,
June 30.

The KING v. BOYLE.

Costs are not recoverable on an extent in aid under the 53 Geo 3, ch although sued to secure the stamp duties on policies of insurance in the hands of an insolvent

agent of the company, and founded on their bond to the Crown for the due payment of those duties; and although the debt be of such a nature as that an immediate extent might have been issued on it.

The

The defendant had been found by inquisition indebted to the *Norwich Union Assurance Society*, under an extent issued against them, as their agent, for duties and premiums of insurance paid to him, on their account, to the amount of 300*l.*, for which the extent had issued. The debt had been afterwards reduced to 240*l.*; and when the sheriff had seized the defendant's effects under the writ, the assignees satisfied the extent by paying the debt and costs, amounting together to 297*l. 8s. 2d.*, the debt being 240*l.*, costs 25*l. 14s. 10d.*, sheriff's poundage 14*l. 10s.*, and 16*s. 6d.* for costs of sheriff's officer seizing and keeping possession.

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The KING
v.
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Under these circumstances, it was objected that this proceeding, being merely an extent in aid, and not prosecuted for the immediate debt of the Crown, was not within the statute, and that therefore the costs of recovering the debt ought not to be allowed, but that they should be deducted out of the debt, as was the regular course before the passing of the 53 *Geo. 3.*

Dauncey, contrā, contended, that notwithstanding the extent was in form merely in aid of the *Norwich Union Society*, it was sued, in effect, as appeared by the inquisition, for money actually due to the Crown for stamps; and that the debt, as returned, was one for which an immediate extent might unquestionably have been issued, as part of the sum due was for stamp duties, in which case there could have been no doubt but that the costs might have been levied.

1815.

The KING
v.
BOXLE.

[*Wood, Baron.* The statute was made in favour of the king's collector, and gives no costs on extents in aid against the debtor of persons so indebted to the Crown.]

The whole question here is, whether this is not a recovery of duties by persons suing on behalf of his Majesty; and from the nature of the debt this case must be considered as coming within the words and purview of the Act of 53 *Geo. 3*, sec. 23*. The duties were actually the proper monies of the Crown, in the hands of the defendant, and were recovered by means of this extent.

Raine, in reply. It does not appear by the proceedings what species of duties had been received by the defendant; but in all events it constituted him a mere simple-contract debtor to the *Norwich Society*, as his employers, and they were the party alone responsible to the Crown for the money received by their agent.

* 'And, for better securing the duties in general under the management of the commissioners of stamps, be it further enacted, that in all actions, bills, plaints, informations and proceedings, had, commenced, prosecuted, entered or filed, or hereafter to be had, commenced, prosecuted, entered or filed, in the name of his Majesty, his heirs or successors, or in the name of any person for and on the behalf of his Majesty, his heirs or successors, for the recovery of any duties, debts or penalties granted or imposed, due or payable by or under any act or acts of parliament now in force relating to the duties under the management of the commissioners of stamps, or by or under this act, it shall be lawful for his Majesty, his heirs and successors, to have and recover such duties, debts and penalties, with full costs of suit, and all charges attending the same.'

THOMSON,

THOMSON, Chief Baron. There is no doubt that in this case an immediate extent might have been issued against the defendant for the duties received by him, notwithstanding he received them as agent for the prosecutors of this extent: nor is there any doubt but that then the Crown would have been entitled, under the Act, to costs, but this as it stands at present, is certainly a very different case! It is not a proceeding immediately and directly against *Boyle*, but it is founded on the bond debt of *Bignold* and Company to the Crown. The condition of that bond is not set forth, but I presume it is to enforce the payment of duties on insurances which may be in arrear.

The commission recites, that *Bignold* and Company became bound to the King in the sum of 15,000*l.* by bond, payable at a certain day past, and requires an inquisition to be taken of debts due to them; the return to which is, that *Boyle* was indebted to the Company in the sum of 300*l.* for money had and received by him for their use, for premiums and duties on policies of insurance granted by the society, and paid to him as their agent. The debt is therefore found in aid of the Crown's original debtor. It is indeed due for stamps, but then it is for money received for the use of the Company. The addition of that fact so found, therefore, amounts to no more than if the inquisition had stopped at the words "for money had and received." It seems to me to be not a case within the act.

The other BARONS of the same opinion.

Motion ordered.

Saturday,
1st July.

The ATTORNEY GENERAL v. NEWMAN.

The restrictive proviso in the 12th *Anne*, ch. 2, limiting the right of the Crown to proceed for arrears of duties on malt to a period of five years previous to the commencement of suit, is not now in effect, not having been re-enacted by any of the subsequent malt acts referring to that statute.

Tuesday,
30th May.

Clauses limiting the right of the Crown are to be considered as repealed by subsequent statutes, unless expressly re-enacted.

ON the trial of this cause at the sittings after last *Easter* term, in which the Attorney General had proceeded by *scire facias* to recover the sum of 1,097*l.* 10*s.* 8*d.*, arrears of excise duties on malt, found by inquisition to have accrued due to the Crown from the defendant, who was a maltster, between the 5th *September* 1804, and the 5th *July* 1807, the Counsel for the defendant objected that the claim was barred by the clause of limitation in the act of the 12th *Anne*, stat. 1, ch. 2; but the objection being overruled, and the cause proceeding, a verdict was found for the Crown for the sum demanded.

PELL, *Serjeant*, now moved for a new trial, or that a verdict should be entered for the defendant, on the ground of his former objection. He submitted, that the question raised was of great importance, and worthy of the most serious consideration, both as it affected the interest of the trader and the rights of the Crown. If it could be made to appear that all the enactments and provisions of the 12th *Anne* had survived the year for which that act had been passed, as well the clause of limitation of actions for arrears of duties therein provided, as all other its "clauses, powers, rules, matters, and things therein contained," (which are the words of the act), that clause of restriction must be regarded as being still in force; and that would certainly be

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be a construction consistent in all respects with the principle of limitations of suit, which in all cases have been dictated by the humane policy of affording quiet to mens minds from apprehension of being called on to answer for long-past offences, and from which, in all sources of civil actions, and in most of minor delinquencies, the Legislature had provided an amnesty. That statute has certainly been in every other single respect treated as being in existence, without any express re-enactment, and that even as to the penalties which had been originally imposed by it; and being so confessedly in force in respect of its penal clauses, it ought to be so considered in regard of its restrictive and lenient provisions, which were intended to have the effect of fixing a period when a subject in this branch of trade, who has long closed his concern with business, may consider himself free from the disquietude of contests with the Crown. Such protection was once certainly afforded to the trade by this the earliest act, imposing a duty on malt; and the question to be discussed on this occasion will be, whether that protecting clause has been kept alive by the reference and recognition of this statute by the subsequent acts on the same subject, and is therefore still in force.

By the 12 Anne, stat. 1, ch. 2*, (which grants a duty of 6 d. a bushel on malt for the service of the year 1713, and imposes certain penalties on conducting the process of malting other than as therein prescribed) it is provided, "that no person shall be

* Not printed.

"sued,

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“sued, or charged with the duties hereby granted,
“unless some action, information, or suit be com-
“menced for the same within five years after the
“same shall become due.” That act has been
referred to or recited by most of the subsequent
malt acts, and made the ground-work and basis of
enactments in several of them. There are but few
that have not in some way or other, expressly, or
by inference, referred to it from that time to the
46 Geo. 3, treating it as being continually and
wholly in force. The 12th of Anne was certainly,
(as indeed all the malt-acts were at that period)
merely an annual act, and expired with the year
for the service of which it was passed. That act
expired on the 24th *June* 1714, when by another
act of her Majesty (12 Anne, stat. 2) the same
duties were *continued* till the 24th *June* 1715, to
be raised, &c. “by the same ways, means, and me-
“thods, and by such rules and directions, and with
“such allowances and repayments, and under such
“penalties and forfeitures, and with such power of
“mitigation, and other powers, and in such manner
“and form, in all respects, as are prescribed, men-
“tioned and expressed in the said former act, or in
“any other act or acts of parliament thereby refer-
“red unto, or any of them, for or concerning the
“said Duties, or any of them; and that the same
“act formerly made and passed, and the said other
“acts thereby referred unto, as to, for, and con-
“cerning the said duties upon malt, mun, cyder,
“and perry; and every article, rule, clause, mat-
“ter and thing, in them, and every; or any of
“them contained, or thereby referred to, and now
“being

" being in force, shall be of full force and effect, to
 " all intents and purposes, for raising, levying, col-
 " lecting, securing, and accounting for the same rates,
 " duties, and impositions hereby granted, or con-
 " tinued, and for levying and recovering the penal-
 " ties and forfeitures, and making any mitigations or
 " allowances, and all other matters and things, dur-
 " ing the continuance of this act, as fully, as if
 " the same were particularly and at large repeated
 " in the body of this present act." By the 8th
 Geo. 2, the duties on malt made in *England*
 are continued, and duties are granted on malt to
 be made in *Scotland*; and it contains a clause
 of reference to the former acts, in precisely the
 same terms as in 12 Anne, stat. 2, already adverted
 to, and those by them referred to. The 13. Geo. 1.
 ch. 7. recites, that duties were granted by the
 12th Anne, and continued by subsequent success-
 sive annual statutes to the 12th of his Majesty's
 reign; and enacts a further continuance till 24th
 June 1728, with the same reference still in the same
 terms. So, also the 15th, 20th, and 27th Geo. 2,
 and 1st Geo. 3, ch. 3, which are so far precisely
 similar; but the last afterwards also refers to the
 clause of the 12th Anne, stat. 1, as to the penalty of
 2s. 6d. thereby imposed on maltsters treading the
 corn, and to a similar clause in the 6th Geo. 1st,
 "which said clauses (it, recites) have been duly
 "continued, and are still in force." In the 33rd
 of Geo. 2, there was also passed an act granting, for
 the 1st time, a perpetual duty on malt of 3d. a
 bushel, and that act refers to the annual malt-act of
 the same session, for continuing the duties (in the
 usual manner) for the year 1760; and also refers to
 the

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the acts therein referred to (among which is this of 12 *Anne*), declaring them to be still in force. The 20th *Geo. 3*, granting an additional duty of 6*d.* a bushel on malt, enacts, that " all and every the powers, authorities, directions, rules, methods, exemptions, bounties, penalties, and forfeitures; clauses, " matters, and things," contained in the 33rd *Geo. 2*, shall be in force. The 42nd *Geo. 3*, recites all the annual malt-acts from 1st to 41st *Geo. 3*, and continues those duties to 1803. The 16th section of the 42 *Geo. 3*, recites the 12th *Anne*, and increases the penalty for treading the couch from 2*s. 6d.* to 5*s.* the bushel. The 46th *Geo. 3*, ch. 139, sec. 6, recites the 12 *Anne*, and the annual malt-act for the then year; and also reciting that the penalties on maltsters not making monthly entry at the excise-office of malt made by them, having been found insufficient, and that it was expedient they should be increased, enacted, that a penalty of 100*l.* should be forfeited for any such offence, instead and in lieu of the sum of 10*l.* mentioned in the said recited statute of *Anne*. And section 7 of the same statute increases the penalty of 10*s. a bushel*, imposed by the 12 *Anne*, for concealing malt from the officers, to 200*l. a bushel*. The 48 *Geo. 3*, ch. 74, sec. 18, increases the penalty of 50*l.* as imposed by 12 *Anne* on the erection of cisterns, &c. without notice, to 200*l.*; and in section 23, refers to the entry required to be made by 12 *Anne*. The 53 *Geo. 3*, ch. 15, also contains the general embodying clause of the former acts*.

* The usual annual malt-acts continued to be passed yearly during the whole period.

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From this review then, it should seem that the 12th *Anne* has constantly been not only treated as in existence and force, but has been made the basis and ground-work by adoption, and even by alteration, (and that most particularly as to the penalties imposed by it) of many of the subsequent statutes, both annual and permanent; and on the whole there is no apparent reason why the clause of limitation, which has never been expressly repealed, should not have been kept alive and in force equally with those other clauses and penalties which have also, on the other hand, never been expressly re-enacted, but have been suffered to revive by mere implication.

[*Wood, Baron.* The malt-acts form together a body of excise law, and must be taken in *pari materia.*]

Dauncey, Clarke and Walton, this day, showed cause: They treated the point now made as a question depending altogether on the mere construction of the several statutes, which having been singly and successively already gone through, were sufficiently before the Court. They contended, that the limitation in the statute, on which the question arose, has certainly been considered as in effect repealed, that particular clause not having been once in any one of the many subsequent acts re-enacted, or even referred to, which subsequent statutes have constantly been acted on by the Court, as if no such limitation were in existence. There is certainly no such restriction in the proceedings for recovering any other of the excise duties;

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duties; and there is no reason why the maltster should be exclusively privileged. It is remarkable that in an earlier act, (the 9th of *Anne*), the same limitation is expressly enacted, and in the 11th *Anne* that clause is omitted. It is then once more introduced in this statute of the 12th *Anne*, and dropped ever afterwards. Hence it appears, that the Legislature, as to that clause, considered its omission as a repeal, and that it could only be revived by express re-enactment. In the case of *The King v. Skone* (a), where the question was, whether an appeal lay to the Quarter Sessions against a conviction of magistrates for a penalty under the 42nd *Geo. 3*, ch. 38, sec. 30, which had given an appeal against forfeiture, Lord *Ellenborough* said, "If there be no words of reference "to any act giving such an appeal, we cannot "supply the want of them. Now the clauses in "the statutes of *Charles 2*, and *Geo. 2*, have not "the word *penalties* in those parts giving the "appeal; and when that word occurs in other "clauses, in other respects fac similies, it seems as "if the omission were intentional; but if it were "not intended, we can only say of the Legislature "quod voluit non dixit." That case is in point to show that the rights of the Crown cannot be limited without express words: so here, the statute of the 12th *Anne* continues in existence only so far as it is expressly referred to, and that is only as to the modification of the proceedings, and not to their limitation or restriction.

(a) 6 East, 518.

Pell,

Pell, Gaselee, and Minchin, in support of the rule, insisted, that sufficient cause had not been shown against it; that if there was no express reference to the clause of limitation, there was also no express reference to the penalties till the 41st *Geo. 3*; and that statute certainly treats the penalties imposed by the 12 of *Anne* as having been ever since in force, and that could only be by considering that act as being wholly in existence and effect.

[*THOMSON, Chief Baron.* The adoption of the penalty is certainly a recognition so far.]

They have not, nor can they show, any instance of the Crown having recovered arrears beyond the time of limitation imposed by the act of 12 *Anne*.

The case which has been cited does not bear on the present. There were two distinct authorities from which appeals were given; and a distinction was made by Mr. Justice *Ashhurst*, in the case of *The King v. The Justices of Surry* (there cited), between appeals from commissioners and from justices; from the latter (his lordship said), it was plainly not the intention of the Legislature to give an appeal. If the 12th *Anne* expressly re-enacted the restrictive clause, after it had been once introduced, and subsequently omitted, it was because the 9 *Anne*, in which it had been first enacted, had expired, and was at an end; for that act had not been revived by reference in any subsequent act, as statute of the 12 *Anne* had been.

THOMSON, Chief Baron, now delivered the judgment

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ment of the Court [having stated the proceedings, and the objection taken on the trial, on which the point under discussion was reserved]. The question brought before the Court by this motion is, Whether the clause of limitation introduced in the malt-acts of the reign of Queen *Anne* has been incorporated in the subsequent acts, and remains in force at this day. It has been very fully and ably argued on the part of the defendant, that, taking all the statutes on the subject together, and considering the dependence of the subsequent on the preceding acts, that limitation is continued throughout, from the 12th of *Anne* down to the present time; but that is a point which it is strictly incumbent on the defendant clearly to make out. It is certainly true, that the statute of the 12th of *Anne* is very frequently referred to by most of the succeeding acts, and many of the clauses therein found are re-enacted, some with and some without alteration, but not this particular clause of limitation; and it appears to me that such reference has no other effect than to continue to the Crown the powers and authorities of that act by which it was enabled to recover the duties thereby given, and the penalties thereby imposed in the execution of the subsequent acts, and to preserve the modes of proceeding prescribed by that statute for those purposes, and to re-enact every thing which was to enable the Crown to prosecute its claim to those duties: But notwithstanding such constant reference, as far as I can find, on mature consideration of the arguments, attentive investigation of the several acts, and comparison of the various clauses, there is nothing in the existing laws which can be construed

construed as an adoption of that particular clause which limits the right of the Crown to proceed within any determinate period. In that act the limitation is in terms expressly confined to the duties imposed by it, and in none of the many references to the statute of *Anne* do I find any, directly or indirectly adopting the clause of limitation, so as to enable me to say that all the subsequent acts are subject to that restriction.

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Even if it were a doubtful case on the construction of the statutes, it is a clear rule, that the right of the Crown is not to be taken away by doubtful words or ambiguous expressions. But it does not appear to me to be necessary to resort to that argument here, where there is nothing from which it can be even inferred that the limitation at present exists.

My brother *Wood*, who has left the Court to proceed on the circuit, has been apprized of our opinion on this case, and that as the occasion is pressing it would be now delivered. He has authorized me to say that he has no objection to the judgment of the Court being so delivered; but that not having made up his mind on the question, he wishes to be considered as neither assenting to or dissenting from the decision.

Rule discharged.

1815.

Friday,
June 30.

The KING in aid of COOKE v. EDWARDS.

If a greater sum than is actually due, and costs, have been levied under an extent in aid out of personal effects, the Court will, on motion, order the surplus and costs of the proceeding which have been so levied to be refunded to the defendant, together with the costs of such an application.

COOKE, who was a collector of taxes, had received, in the course of his duty, certain notes of the firm of *Edwards & Co.* bankers in the country, to the amount of 45*l.*; and they having become bankrupts he had obtained an extent in aid against them, under which the sheriff levied on the personal estate of the defendants, the several sums of 55*l.* for the original debt, 22*l.* 16*s.* 8*d.* for the solicitor's costs of the proceeding, and 4*l.* 2*s.* 6*d.* sheriff's poundage. But the mistake in the amount of the original debt having been subsequently discovered, and the defendants being advised that the costs should not have been levied,

Owen had moved for an order, calling on the Sheriff, and *Cooke*, to show cause why the overcharge of 10*l.* and the costs levied, should not be refunded, and the costs of that application paid to the surviving assignee of the defendants, under the circumstances of this case, as disclosed by affidavit, which was granted in the terms prayed, with a direction that a copy should be served on the solicitors for taxes, and

Cause being this day shown, the Court made the

Rule absolute.

1815.

DELIUS v. ROUGEMONT and others.

Saturday,
July 1.

PHILLIMORE had moved on a former day, on the part of the plaintiff, for a commission to examine a witness, *de bene esse*, on interrogatories, before he should leave *England*. His affidavit stated, that an action at law had been commenced by the plaintiff against the defendants in the Common Pleas;—that the defendants had obtained an injunction to restrain the plaintiff from proceeding in that suit, and that it could not therefore at present be tried;—that the testimony of the witness was material; and that he was about to depart from this country. The defendants had appeared, but had not answered, and were therefore in contempt.

The Court will grant a commission to examine a witness who is in this country, on an affidavit of his being under a necessity of going abroad before the day when the cause will be tried, and although the cause be not at issue, and the answer has not come in.

The application stood over for the consideration of the Court, and that the practice of the Court of Chancery might in the mean time be inquired of; and on being renewed, the Court doubted whether they could grant a commission to examine a witness, being in *London*, on the ground of his being about to leave the kingdom, and whether, if they could, the depositions would be admitted in a Court of law; and suggested that the course should have been, to have had the defendants brought up in the custody of a messenger.

The case of *Cazenove and Vaughan* (a) was

(a) 1 *Maule & Selwyn* 4.

G G 2

cited,

1815. cited, as applying to both those points, where the same application had been granted in the Court of Chancery, and the depositions received in evidence in the *King's Bench*.
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That was a case where the action pending could not be tried on the day appointed, and the commission was granted on an affidavit that the witness could not stay longer in *England*.

RICHARDS, *Baron*. This case is certainly stronger than that, for here there is an injunction contravening the bringing this cause on for trial, and there there was merely a postponement. I never knew an instance of it before.

THOMSON, *Chief Baron*. That case in Chancery is certainly an authority, or I should have thought it could not have been done.

Take the order, in the terms of that granted by the Lord Chancellor.

END OF SITTINGS AFTER TRINITY TERM.

A N

I N D E X

TO THE

P R I N C I P A L M A T T E R S.

A.

ACCORD AND SATISFACTION.

Vide PLEADING, N° 1.

ABATEMENT.

Vide MISNOMER, N° 1.

ACTION ON THE CASE.

1. THE owner of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window-lights by adding to his own building, however short the previous period of enjoyment by the plaintiff. *Compton v. Richards.*

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2. *Vide PLEADING, N° 2.*

ADMITTANCE (to Copyholds.)

Vide MEMORIAL, N° 1.

ADVOWSON.

Vide CONTRACT, N° 1—DECREE.

AFFIDAVIT.

1. An affidavit to ground a motion for a rule nisi cannot be sworn before the attorney for the party, or his partner. And a rule obtained
G e 3 tained

tained on such an affidavit will be discharged with costs.

Batt v. Vaisey - - - - 116

2. The Court will not, on a motion for a new trial, hear an affidavit of any facts which might have been brought forward at *Nisi Prius*.
Hope v. Atkins - - - - 143

3. In affidavits to be read, it must appear by the *jurat* that all the deponents have been sworn.

Rex v. The Sheriffs of London, in a cause of Parlett v. Barnett - 338

4. An affidavit by an executor of a debt due to his testator, as appears from a statement made from the testator's books, by an accountant employed by the deponent, is insufficient to hold a defendant to bail. *Rowney v. Dean* - - 402

5. It should appear clearly from the affidavit of service of a declaration in ejectment, that the person who is the object of such service is tenant in possession. *Doc dem. Walker v. Roe* - - - - 399

6. The Court will not permit a plaintiff in aid of a motion for an injunction to restrain an acting partner from collecting or incurring debts, to use an affidavit made and filed after the coming in of defendant's answer; because they will not consider such a case as ~~one in the nature of irreparable waste~~, in which case such an affidavit made and filed before answer might be used.

Lawson v. Morgan - - - 303

7. The rule of Court not indispensable, that the affidavit to ground an extent in aid should contain an allegation that the debt is not a trust debt. *R. v. Mainwaring*, 202

8. *Vide DISCOVERY.—SUBSCRIBING WITNESS.*

AGREEMENT.

1. Conditions of sale amount to an agreement. *Compton v. Richards*, 37

2. *Vide SPECIFIC PERFORMANCE.*

AMENDMENT.

1. A Plaintiff cannot amend his bill to enjoin further proceedings at law, after verdict, without first paying into Court the sum recovered at law, although the original bill was filed before verdict obtained.

Harrison v. Delmont - - - 117

2. But he will be permitted to amend by a stated time on bringing the money into Court.

Harrison v. Delmont - - 118

3. A plaintiff cannot move to amend his bill on an affidavit of equitable facts, without previous notice to the defendant. But under peculiar circumstances the Court will, if it be late in the Term, order the defendant to accept short notice of the motion - - - - - *ib.*

ANNUITY.

Vide MEMORIAL.

ANSWER.

Vide PLEADING IN EQUITY, N^o 1, & 2.—EXCEPTIONS, N^o 2, & 3.—SIGNATURE OF COUNSEL.

APPEAL.

1. The Court will not order money which has been awarded to be paid to a party by an arbitrator, to be paid into Court, for the purpose of preventing it getting into the hands of the person who has so become entitled to it, (an order of Court having been already made to pay it to him according to the award;) on the ground of an appeal being pending against the refusal of the Court, to set aside the award, if the appeal has not been received; although the petition has been signed by counsel.
Lewis v. Harber - - - 132

2. But *semble secus* if the appeal has been received - - - - - *ib.*

APPEARANCE.

1. A defendant may move to dissolve an injunction for insufficient service of the subpoena although he has not appeared. *Menzies v. Rodrigues* - - - - - 92

2. An attorney, having once entered an appearance for a party, not entitled to strike it out, but on an application to the Court for leave. *Menzies v. Rodrigues* - - - 92

3. *Vide MISNOMER.*

APPRAISEMENT (Writ of).

Vide CUSTOMS, 1.

ARREST.

Vide AFFIDAVIT, 4.—*MISNOMER*, 2.

ASSIGNMENT.

(*Of Premises.*)

Equitable Mortgagees, under a deposit of title deeds by way of pledge, cannot effect a valid assignment of the premises comprised therein, in the event of the person so pledging them becoming bankrupt, unless the assignees of the bankrupt join in the conveyance, although a power of sale be given by the agreement entered into at the time of the deposit, on notice to repay the money intended to be secured, if no such notice has been given.

Hawkins v. Ramsbottom & Co. 138

(*Of Breaches.*)

Vide PLEADING, N° 3.

ASSIGNEES.

(*Of Bankrupt.*)

Vide ASSIGNMENT OF PREMISES.

ATTACHMENT.

(*Rule for when absolute in first instance.*)

1. On motion for an attachment for not paying money under a previous order of the Court, against a party who has been called on by a former rule to show cause why that money and the costs of such application should not be paid, and against which order no cause has been shown: the rule for the attachment

ment will be granted absolutely in the first instance.

King v. Price - - - 341

(When not duly served.)

2. Order of the Court, that a defendant pay a certain sum of money, being shown to the defendant at the time of making a personal demand of it, a copy of such order not having been personally served on the defendant himself, (although a copy had been previously served on his attorney) not sufficient to entitle the plaintiff to an attachment. *Broderick v. Teed* - 401

3. *Vide RENDER, N° 1 & 4.—NE EXEAT REGNO.*

ATTORNEY.

*Vide AFFIDAVIT, N° 1.—APPEAR-
ANCE, N° 2.—Costs, N° 2.—
VENUE, N° 3.*

AWARD.

If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the Court will not interfere to set aside his award on that ground, although the party applying offer to pay all the previous costs incurred:—considering the parties bound by his decision. *Campbell v. Tyemlow* - - - 81

B.

BAIL.

1. Justification of bail at Chambers in vacation without consent, held

not good, but plaintiff not objecting to an application to the Court to permit such justification, considered tantamount to consent.

Sayers v. Tolfree - - - - 2

2. In the case of a bankrupt charged in execution, the Court will, on application, enlarge the time for his surrender in discharge of bail, notwithstanding the provision in the statute of 49 Geo. 3, permitting bankrupt in custody in execution to be brought before the Commissioners. *Crump v. Taylor* - 74

3. The Court will not set aside an order for allowance of bail obtained after an action commenced against the sheriff for an escape, though no bail-bond has been taken, nor bail above put in due time after the return of the writ, if defendant has been rendered.

Morley v. Cole - - - - 103

4. Surrender of the principal by bail below after bail above put in, but not perfected, though before assignment of the bail bond, does not discharge the bail to the sheriff after the return of the writ. *Turner v. Wheatley* - - - 262

5. Description of bail as of his place of business sufficient.

Tanner v. Nash - - - 400

6. *Vide MISNOMER, N° 2.—RENDER.—JUSTIFICATION.*

BANKRUPT.

*Vide BAIL, N° 2.—TRADING, N° 2.—
SECRET PARTNER.*

BEQUEST.

Real property bequeathed to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, and to go in aid (if necessary) of the rest of his property, in discharge of his pecuniary legacies, given either by his will, or any codicil thereto, would be considered in equity as personal property, and would go, in case of the legatee's death, to personal representatives, although the residuary legatee took the property *in statu quo*, and the trustees did not convert it into money by sale, according to the directions of the will; there being no claim to render such sale necessary.

Attorney General v. Holford 426

Vide LEGACY DUTY.

BOND (to the Crown.)

1. Bond to the Crown, though not forfeited, is sufficient to entitle the obligor to an extent in aid.

Res v. Mainwaring - - - 202

2. *Vide PLEADING*, N° 2.

C.

CARRIERS.

(*When not liable.*)

1. Notice by a carrier that he will not be responsible for goods sent to be conveyed by his coach, unless

paid for according to their value, is not defeated by proof that the book-keeper who received them was conscious of or might have inferred their value.

Leti v. Waterhouse - - - 280

2. A parcel delivered to the guard of a mail-coach, and by him to the porter of the inn where the mail stops, whose business it is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for carriage, does not make such porter personally responsible for its loss. *Cavenagh v. Such* - 328

CLERK IN COURT.

All notices must be given by and addressed to Clerks in Court.

Calvert v. Bowater - - - 328

COMMISSION.

The Court will grant a commission to examine a witness *de bene esse* while in this country on a bill filed and affidavit that he is under the necessity of going abroad before the trial come on.

Delius v. Rougemont - - - 448

COMMON (Right of).

Vide GRANT.

COMPOSITION (real).

Vide EVIDENCE, N° 4.

CONDEMNATION.

Vide Customs, N° 2.

CONDITIONS OF SALE.

Vide Agreement, N° 1.

CONSTRUCTION (of Wills.)

Vide Devise, N° 1, & 2.

CONSTRUCTION (of Statutes.)

1. The statute of 8th Anne, imposing a penalty of treble the value, on the importation of foreign goods prohibited to be imported into this country, is prospective in construction and operation, and extends to all such goods as have been or may be prohibited subsequently to that statute.

Attorney General v. Saggers - 182

2. Clauses limiting the right of the Crown are to be considered as repealed by subsequent statutes, unless expressly re-enacted.

Attorney General v. Norman 438

CONTEMPT.

1. Defendant brought to the bar of the Court for contempt in not putting in his answer, being an infant, the Court on suggestion of his infancy, will assign him a guardian, and discharge him.

Wilson v. Bott - - - - 62

2. Defendant may be brought up on any day in term - - - - ib.

3. *Vide Injunction*, N° 1.

CONTRACT.

1. A party having contracted with a person, since deceased, for the purchase of an advowson, but who has taken no steps during the lifetime of the vendor to enforce the contract, or for a considerable time after her death, (objecting to the title on the ground of outstanding judgments, and a creditor's bill pending) held not entitled as against a devisee to present, if a vacancy occur in the mean time, though he has not renounced his contract, but insists on having it completed. *Wyvill v. The Bishop of Exeter* 292

2. *Vide Specific Performance*, N° 1, & 2.

COSTS.

1. Motion for costs for not proceeding to trial and for judgment, as in case of a nonsuit, should be made successively in that order.

Morgan v. Bidgood - - - 61

2. A solicitor may proceed to tax his costs after verdict at law, notwithstanding an injunction to stay execution, with a view to commencing an action in his own name for the amount, after a final settlement between the parties, by arbitration, without his concurrence.

Brooke v. Bourne - - - 72

3. If, in consequence of a party insisting on the completion of a contract for the purchase of an advowson on a good title being made

made

made to it, and who has, previously, constantly objected to the title tendered, a bill become necessary on the part of the representatives of the party who originally contracted to sell to ascertain the true claim to the next presentation, (a vacancy having occurred in the mean time, and the right to present is claimed by the purchaser) whereby the right is put in danger of lapse; a decree in favour of the plaintiff will carry costs as far as his claim came in question, although it be part of the decree that, subject to the next presentation, the defendant be permitted to complete his contract.

Wyvill v. The Bishop of Exeter 292

4. If a cause standing for trial be referred, and the arbitrator's award in favour of the plaintiff should be afterwards set aside, and the cause be in consequence subsequently tried, the plaintiff, if he should afterwards succeed on that occasion, will be allowed the costs of the former trial.

Poole v. Selwood - - - 310

5. If a plaintiff subpoena witnesses in a cause then ready for trial, but which does not afterwards, in fact, come on to be tried, in consequence of his declining to reply, and take issue on a new fact, subsequently put on the record by additional plea—the expenses of the actual attendance of those witnesses are allowable on taxation of his costs, (the plaintiff ultimately succeeding on the trial of the cause) although he do not countermand his notice of trial in time, notwithstanding there might have been time enough for him to have done so, during the intermediate period, and even to have replied and taken issue on the additional plea—on the ground

that a plaintiff shall, in such case, be considered entitled to a reasonable time to give instructions for advice, and otherwise prepare himself.

But it should seem, that in such cases there must appear to have been some unnecessary delay, or other suspicious conduct on the part of the defendant.

Allison v. Noverre - - - 381

6. A defendant having obtained an order for costs for not proceeding to trial, may set them off against the damages ultimately recovered by the plaintiff, on the trial of the cause. *Lang v. Webber* - 375

7. Costs are not recoverable on an extent in aid under the 53 Geo. 3, although sued to secure the stamp duties on policies of insurance in the hands of an insolvent agent of the company, and founded on their bond to the Crown for the due payment of those duties; and although the debt be of such a nature as that an immediate extent might have been issued on it.

Rex v. Boyle - - - - 434

8. *Vide AFFIDAVIT, N° 1.—EXTENT, N° 11.—DECREE.*

CUSTOMS.

1. It is not necessarily essential to an order of the Commissioners of Customs, made under the 51st Geo. 3, to restore goods seized, that any terms or conditions should be imposed on the Proprietors by that order, and the Court will not refuse to stay proceedings on a Writ of Appraisement on that ground, in behalf of the seizing officer, although the application to do so proceed

proceed from the Crown and not from the claimant. But they will not quash the writ if regularly issued. *In the matter of the Ship Maria* - - - - - 4

2. The Court will set aside condemnation of the subject of seizure even after the expiration of the usual time of fourteen days allowed for entering claim, on satisfactory affidavit of merits. *In the matter of the Ship Lucia Margaretha* 48

3. *Vide PLEADING*, N° 5.

D.

DEBTOR.

(*To the Crown's Debtor in 3d degree.*)

Vide EXTENT, N° 1.

DEED.

Vide EVIDENCE, N° 4.

DEMURRER.

Vide PLEADING (in Equity), N° 1.

DEMOLITION OF MILLS.

Vide RIOT ACT.

DEPOSITIONS.

Motion that depositions of a witness, taken to perpetuate testimony, may pass publication, he being since deceased, is of course. *Bourne v. Bligh* - - - 307

DEPUTY REMEMBRANCER'S REPORT.

(*When necessary.*)

The Court will not make absolute the common order nisi to dissolve an injunction granted to restrain a purchaser from proceeding at law to recover part of the purchase-money paid by him in advance, (the contract being impracticable on the ground of want of title, and outstanding encumbrances) without the Master's report as to the sufficiency of the title, although the objections are fully stated in the defendant's answer. *Church v. Legeyt* - - - 301

DEVIATION.

Where a captain on a voyage, delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions, (although he also transmits a letter at the same time) it is not a deviation, and is a question to which the jury are competent. *Thomas v. The Royal Exchange Assurance* - - - 195

DEVISE.

1. A bequest over in case of the death of a devisee generally, and not expressly referrible to any certain time or event within or before which such dying must occur to give effect to such remainder; held not necessarily to refer to a dying in the life-time of the testator; but will be construed so as to give effect to such an intention on the part of the testator as may be presumed, from the language of the will, to have been his object. Thus a bequest of personal property 'to A. for life, remainder to her three children in equal shares, and in case of the death of either or any of them, the share of such so dying to go to their children,' is a vested interest, subject to be divested if either of the legatees in remainder die during the life of the particular tenant; and his share then becomes the property of his children, and not of his personal representatives. *Hervey v. M'Laughlin* - - 204

2. A devise (introduced by the words "I do give and dispose of all my worldly goods," and preceded by a devise, immediately following those words, of a manor and lands) "of 'the perpetual advowson of Hus-
"band's Bosworth, in Leicestershire,
"and my manor of Stanwick, and
"all my lands in Northampton-
"shire," held not sufficient to carry a fee in the lands in Northamptonshire, to a devisee, who was one of three residuary legatees, for want of words of inheritance or perpetuity; and that he only took an estate for life in the lands so devised, the Court giving no opinion as to what estate he took in the advowson, holding, that even if he had taken a fee therein, it would not have altered or extended the

effect of the subsequent devise of the lands; but that the rule of law must prevail against the apparent hypothetical intention of the testator. *Doe dem. Crutchfield v. Pearce.*

353-

DISCOVERY.

The Court will not grant an application made on the coming in of defendant's answer to a bill for discovery, that the plaintiff may be permitted to search the boxes of an absent individual, (which have been left in the hands of the defendant as a depositary) for the purpose of ascertaining whether the property of the applicant be there, on a bill filed for that purpose, to aid by such discovery an information in the nature of an action of detinue, unless good reason be shown, through the medium of facts disclosed by affidavit, for the supposition, that the identical thing sought be there, and that the party applying has an interest in the object of search.

Attorney General v. Elliott 377

DISMISSAL OF BILL.

1. A Replication filed on the day of cause shown against dismissing a bill is irregular, and the Court will order it on motion, to be taken off the file. *Christy v. De Tastet* 242

2. *Vide* REFERENCE.

DISTRESS.

Vide RENT.

DISTRINGAS.

Vide SERVICE OF PROCESS.

E.

EJECTMENT.

*Vide SERVICE OF PROCESS, N° 4.—
AFFIDAVIT, N° 5.*

EQUITABLE MORTGAGE.

*Vide ASSIGNMENT (of Premises).—
EXTENT, N° 4.*

ERROR.

Vide EXECUTION.

EVIDENCE.

1. The point, at least doubtful, whether a woman living with a man as his wife, and having children by him, be admissible evidence to prove the fact of her never having been actually married to him. *Campbell v. Twemlow* - - - 81

2. Parol testimony, though offered merely to explain a written memorandum, and not in any way varying or altering the terms of it, is inadmissible. *Hope v. Atkins* - 143

3. A receipt, even of more than fifty

years old, offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes, is not admissible evidence of the fact of such customary payment having been acted on, so as to establish the defence of a modus; unless it can be also proved who the parties to the receipt were, and in what character they stood,— and unless proof be given of the hand-writing, or death of the party giving it.—*Woon, B. dissentiente.* *Manby v. Curtis* - - - - 325

4. Composition real by grant of land in lieu of tithe, is not proved by reputation of the fact of such an agreement having existed, and being the origin of the exemption claimed; although corroborated by evidence of non-payment of tithe for the district, claiming the exemption: unless a deed, or evidence of one having once existed, be put in proof. *Chatfield v. Fryer* - 258

5. Excise-books transcribed from the maltster's specimen paper admissible evidence against him, without calling the officers to substantiate them; and that although they should be charged to be fraudulent and collusive, without proof of their being so. *Rex v. Grimwood* - 369

6. Parol evidence to explain an imperfectly-worded written contract, even where some parts of it were difficult to be understood alone, not admissible; and that although the chief question in the cause was the nature of the contract which had been rendered doubtful, by partial and incomplete alteration, and which therefore seemed to require to be supplied and perfected by some such additional words as the evidence rejected would have furnished; and although it contained

tained dubious words, involving it in uncertainty as to whether it purported to be a sale of particular merchandise to arrive by a certain vessel, or of such merchandise generally, whenever the contracting party should receive sufficient to supply the purchaser with the quantity.

Halliley v. Nicholson - - 404

EXCEPTIONS.

1. Where exceptions have been filed *unc pro tunc*, the Court will not grant an injunction on opening a material exception, unless the plaintiff, on obtaining his order, give a four-day rule for arguing the exceptions.

Edwards v. Hogarth - - 147

2. Pending exceptions to an answer, a further answer cannot be filed in this Court until those exceptions are argued and disposed of.

3. Such tender of further answer is a submission to the exceptions, and the injunction may be moved for after such an offer as of course.

Edwards v. Johnson and Hogarth 203

EXCHEQUER BILLS.

Vide Extent, N° 5.

EXCISE.

Vide Pleading, N° 1, & 5.—MALT DUTY.

EXECUTOR.

Vide AFFIDAVIT, N° 4.

EXECUTION.

1. The Court will not set aside a writ of execution issued after allowance of a writ of error served on the plaintiff, if the writ of error describe the person suing as the King's debtor, when in fact he had proceeded on a capias of privilege.

Smart v. Taylor - - - - 312

2. *Vide RENT.*

EXPORTATION.

Vide PLEADING, N° 5.

EXTENT.

1. In reckoning the degrees allowed for proceedings on extent in aid, the King's debtor not to be counted.

And the sheriff may return and seize the debts due to the debtor in the third degree, exclusive of the immediate debtor to the Crown.

Rex v. Lushington - - - - 94

2. The Court will not, in exercise of its equitable jurisdiction over extents, grant a writ of *amoveas manus*, to release property seized under an extent in aid against a debtor in a more remote degree, on the ground that the debt which had been found on the original commission to be due to the King's debtor, has been subsequently satisfied,

fied, by the payment of bills of exchange deposited with him for securing that debt; if it appear that those bills were not the *bona fide* property of the person depositing them, who thereby committed a breach of trust; because the Court will consider that the real proprietors of the bills have a paramount claim on the person with whom they had been so deposited, if he has been satisfied his debt by other means. And as between the different debtors to the King's debtor, no one of them has an equitable claim to be relieved from any burden which must consequently fall on some one of the others. *Rex v. Blackett* - - 96

3. Nor is any preference or privity of seizure, as to movable or real goods, and debts, to be observed in the levy, all being alike equally the subject of seizure - - - *ib.*

4. Equitable mortgage by deposit of title-deeds by an Accountant of the Crown, in the hands of one who has an opportunity of knowing that the depositor is, or may become, a debtor of the Crown, is not available against an extent. *Broughton v. Davis and the Attorney General* - - - 216

Quare:—Whether such a deposit by the King's debtor good in any case against the Crown?

5. The Court will order the residue of the proceeds arising out of an extent after the demands of the Crown have been satisfied, to be paid into Court to the credit of the cause (the Crown and Sheriff consenting) and in particular cases they will order that the amount be laid out in the purchase of Exchequer/bills. *Rex v. Freame* - 299

6. The Court will not set aside an extent in aid, on the ground that the debt levied under it is of greater amount than the debt sworn to be due from the original debtor of the Crown, although the party move it on the condition of paying the Crown's debt.

Rex v. Bunney - - - - 394

7. The Court will not entertain a motion on a case of extent, without having the writ before them. *Rex v. Mallet* - - - - 395

8. If two writs of extent are issued, one for a joint debt, and the other for a separate debt, in the *same sum*, on inquisitions finding a joint debt, and a separate debt, in *different sums*, the Court will not set them both aside, on the ground of the irregularity of one of them, though confessedly a mistake, but they will support that which can be shown to be correct. - - *ib.*

9. An extent may be issued on an inquisition, and fiat of eight years old, and no new affidavit or fiat is requisite, nor is any proceeding, by *scire facias*, or otherwise, necessary to revive such extent - - - *ib.*

10. Where a joint debt has been found, the death of one of the debtors in the interval between the fiat and extent does not vitiate the proceedings as against the survivors - - - - - *ib.*

11. If a greater sum than is actually due, and costs, be levied under an extent in aid out of personal effects, the Court will, on motion, order such surplus and costs of the proceeding to be refunded to the defendant, together with the costs of such an application.

Rex v. Edwards - - - - 447

12. *Vide Costs*, N° 6.—**MORTGAGEE**,
N° 1.—**NOTICE**, N° 4.

G.

GRANT.

Exercise of right of common for far more than twenty years, is not such an adverse enjoyment as will authorize the presumption of a grant, if circumstances of difficulty in preventing trespass appear, from the extent of the common, want of fences, or any other cause which may render it attributable to license encroachment, or right *pur cause de vicinage*.

Dawson v. The Duke of Norfolk 246

GRAY'S-INN HALL.

Exchequer Sittings began to be held there 7th January 1815 - - 225

GUARDIAN.

Vide CONTEMPT, N° 1.

H.

HABEAS CORPUS.

1. In case of a question of identity of the person of a defendant to an information, who is in prison, the Court will grant a *habeas corpus* to

bring him up to be present at the trial, he paying the costs of the application and of being brought up. *Attorney General v. Fadden*

403

2. *Vide WILSON v. BOTT*, page 62.

HUNDRED

(*Action against.*)

Vide RIOT ACT.

I.

IDENTITY.

Vide HABEAS CORPUS.

INFANT.

Vide CONTEMPT, N° 1.

INFORMATION.

Vide LEGACY DUTY.—**MALT DUTY**.
MISNOMER.—**PROHIBITED GOODS**.
—**VIEW**.

INJUNCTION.

1. A special injunction to restrain a defendant from distraining, will be granted before answer, if the defendant

H H defendant

fendant be in contempt for not having answered.

Heming v. Emuss - - - 386

2. *Vide AFFIDAVIT*, N° 6.—APPEARANCE, N° 1.—DEPUTY REMEMBRANCER'S REPORT.—EXCEPTIONS, N° 1.—SERVICE OF PROCESS, N° 2.—WASTE.

INSOLVENT DEBTORS.

Vide PLEADING, N° 4.

JURAT.

Vide AFFIDAVIT, N° 3.

JUSTIFICATION OF BAIL.

The Court will permit a justification where the title of the cause is not correctly set out in the bail-piece.
Culvert v. Bowater - - - 385.

Vide BAIL passim.

L.

LANDLORD AND TENANT.

Vide RENT.

LEGACY DUTY.

1. Legacies bequeathed by a British subject resident in the East Indies,

out of his personal estate, to persons living in England, are liable to the duty, if the executor proves the will in England, and pays the legacies here, notwithstanding the testator realized and possessed his property in India,—resided there,—made his will there—and died there,—and although the executors were in India at the time of their appointment, and the will was originally proved there.

Attorney General v. Sir C. Cockerel, Bart. - - - 165

2. A Legacy (bequeathed by will of a person dying in 1771, of a sum of money to an executor to pay the interest thereon to testator's natural child for his life, and on his (the legatee's) death to pay over the principal to the children of the legatee, the interest of which had accordingly been regularly paid to the legatee during his life, up to the time of his death, which happened in 1812, his two sons (his only children) having died long before that time, and previously disposed of their interest in the bequest)—held to be within the 48 Geo. 3, ch. 149, sched. 3, as being a legacy given by will of a person dying before the 5th of April, 1805, and not paid, retained, satisfied, or discharged, till after the 10th of October, 1808, and consequently liable (as to the interest taken by the representatives of the children) to the duty of 8 per cent. imposed by that statute on such legacies, when given for the benefit of strangers in blood to the testator; and that, notwithstanding the principal had, in 1794, been invested in the Funds by the executors (in their own names) to answer the purposes of the will.
Attorney General v. Lady Louisa Manners - - - 411

3. A bequest of real property to trustees

tees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid (if necessary) of the rest of his property, in discharge of his pecuniary legacies, given either by his will, or any codicil, is liable to the legacy-duty imposed by the 48 Geo. 3, ch. 149, although the residuary legatee took the property *in statu quo*, and the trustees did convert it into money by sale, according to the directions of the will: there being no claim to render such sale necessary.

Attorney General v. Holford 426

LIBEL.

1. These words: "The Rev. John Robinson, and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." Published by posting a paper on which they were written, purporting to be a regulation of a particular society, held not to be a libel.

Robinson v. Jermyn - - - 11

2. Justification of a libel, that there was a reason for thinking the imputation was true from what had been said, held bad on demurrer, unless it is stated what had been said, and by whom.

Lane v. Howman - - - 76

LIMITATIONS

(Of Actions.)

Vide Riot Act.—MALT DUTIES,
N^o 2.

M.

MALT DUTIES.

1. Proof of malt not having required so long a space of time in working, and passing through the floors, from the cistern to the kiln, as it had been entered as having taken for that purpose, will, in some cases, be considered *prima facie* evidence of fraud; and duties are recoverable for the amount of so much grain malted as would be commensurate with such excess of time as if so much of the duty were in arrear.

The average number of days necessary for working the grain intended for malt between the steeping and drying, is computed by the Excise at sixteen. *Rex v. Grimwood* - 369.

2. The restrictive proviso in the 12th Anne, ch. 2, limiting the right of the Crown to proceed for arrears of duties on malt to a period of five years previous to the commencement of suit, is not now in effect, not having been expressly re-enacted by any of the subsequent malt acts referring to that statute.

Attorney General v. Newman 438

MEMORIAL

(Of Annuity.)

1. Omission in the memorial of the names of witnesses to the execution by the trustees of a grant of freehold estates,

estates, to secure an annuity, held no objection to the memorial, provided the deed was in fact executed by the trustees, and in the presence of the witnesses who attested the execution of the several cestuis que trust, and such execution and attestation appear accordingly on referring to the deed.

Doe dem. Naylor v. Stephens 38

2. Nor is it necessary that the admittance on surrender of copyholds be memorialized, although the surrenderee were admitted immediately on the surrender. - - *ib.*

MISNOMER.

1. Misnomer of a Defendant held to bail, no ground for cancelling the bail-bond, but must be pleaded in abatement.

Stockdale v. Blenkin - - - 277

2. The Court will not discharge a defendant out of custody, on filing common bail, who has been arrested on a *capias*, describing him by his surname only, omitting his name of baptism, if he has appeared, although by a wrong Christian name.

Sed quere, if he had applied in the first instance, before appearance or plea.

Attorney General v. —— Kelsey 391

MODUS.

Vide EVIDENCE, N° 3.—PLEADING,
N° 2.

MORTGAGEE.

1. If an estate subject to a mortgage, be sold absolutely under an extent, and the purchase-money paid into Court, the Crown will not be allowed, on a motion, to satisfy the mortgagee, but the Court will order a reference to the Deputy Remembrancer, to ascertain what is due on the mortgage.

Rex v. Coombes - - - - 207
2. *Vide Notice*, 4.

MOVING.

1. The application for costs for not proceeding to trial, and for deducting the amount when taxed from the damages ultimately recovered by plaintiff, can not be made by one motion. *Lang v. Webber* - 375

2. An application for an injunction, and the appointment of a receiver, should be made the subject of two successive motions.

Lawson v. Morgan - - - 303

Vide Costs, N° 1.

MODEL

(*As to allowing on trial of Information.*)

Vide VIEW.

N.

NE EXEAT REGNO.

The Court will grant an order in the nature of the *writ ne exeat regno*, against

against an accountant of the Crown, sworn to be about to leave the kingdom without having rendered his accounts; although no precise sum be sworn to by the affidavit made to support the motion, as being the amount in value of the stores unaccounted for. But they will exercise a discretion as to the amount for which they will exact sureties, and will require notice of the order to be given before the attachment shall issue.

Attorney General v. Mucklow 289

with the finding of the Jury. *Earl of Mountedgecombe v. Symons* 278

5. *Vide AFFIDAVIT, N° 2.—TRADING, N° 2.—SHOWING CAUSE.*

NOTICE.

1. The Court will discharge an order for an injunction obtained on a motion of course, if it ought to be moved for on notice.

Reed v. Bowyer - - - - 101

2. A motion founded on an affidavit of facts cannot be made without previous notice to the other side.

Harrison v. Delinont - - 117

3. But under peculiar circumstances they will, in an advanced period of the term, require short notice to be accepted for the next day *Ib.* 118

4. Notice of motion for an order of sale of Crown debtors mortgaged lands, under an extent, should be given to the mortgagee before the motion can be made.

Rex v. Coombes - - - - 207

5. The Court will not hear special cause against dismissal of a bill, unless notice of the cause intended to be shown be previously given to the plaintiffs.

Christy v. De Tastet - - 242

6. *Vide CARRIER, N° 1.—CLERK IN COURT.—NE EXEAT REGNO.—RENDER, N° 3.*

1. The Court will not interfere to disturb a recorded verdict on the affidavit of one of the Jury, that the amount of the damages taken exceeded what they had intended to have given. *Mather v. Bailey* - 1

2. In case of a verdict taken in the absence of defendant and his solicitor, the Court will in some instances grant a new trial, if reasonable cause be shown. *Bearly v. Shapleigh (When a new trial will be granted)* - - - - 201

3. If the Jury find a verdict for a sum certain, according to a calculation which does not warrant the amount, it is a ground for a new trial. *Rex v. Grimwood* - - - 369

4. The Court will order a new trial on questions deciding important rights, where the Judge expressed an opinion on the trial contrary to the verdict, although he afterwards report that he was not dissatisfied

O.

OBSTRUCTING WINDOW
LIGHTS.*Vide ACTION ON THE CASE.*

ORDER NISI

*(To dissolve injunction.)**Vide DEPUTY REMEMBRANCER'S
REPORT.*

ORDER

*(Of Commissioners of Customs under
51 Geo. 3.)**Vide CUSTOMS, 1.*

OUTLAWRY.

A Plaintiff cannot proceed to outlawry in the Exchequer, the Court having no process on which to found such a proceeding.

Horton v. Peake - - - - 306

P.

PARTNER.

The part-owners of trading ships let to freight are special partners.

*Attorney General v. Borrodaile 148**Vide SECRET PARTNER.—WASTE.*PAYING MONEY INTO
COURT.

A plaintiff having obtained an injunction to restrain proceedings at law cannot be called on to pay into Court the sum demanded at law, on an affidavit of equitable grounds, by one of the defendants, the answer of the others not having come in. *Menzies v. Rodrigues* - p. 133

Vide APPEAL.—AMENDMENT, N° 2.

PLEADING

(at Law.)

1. To Scire Facias on bond to the Crown for Excise duties, Plea of payment after day, but before writ issued, and acceptance by the Crown in satisfaction, held insufficient. King not bound by the 4th of Anne. *R. v. Ellis* - 23
2. In an action brought by the owner of one of two adjoining houses, built nearly at the same time, and purchased of the same proprietor, against the tenant of the other, for obstructing window-lights by adding to the building, the form should be case, and it is sufficient that the plaintiff declare on his possession, and that he had sustained a wrong. *Compton v. Richards* 27
3. Assignment of breaches in debt on bond to perform an award in the words of the award generally, held sufficient, although the plaintiff do not show that the defendant had become enabled to carry it into effect by the circumstances having taken place on which it was to have been performed, the award being held to assume that they had. And the fact of such circumstances not having

having taken place, if they lay properly within the defendant's knowledge, should be pleaded and set out by him. *Wilcox v. Nicholls* 109

4. Plea by insolvent debtor of having been discharged under 51 Geo. III. not a good plea to an action of covenant brought against defendant by the assignee of a policy of insurance, for not paying according to his covenant the annual premium for keeping the insurance on foot, which accrued due subsequently to his discharge: it not being such a sum of money payable at a future time as was contemplated by the Legislature on passing the Act.

La Coste v. Gillman - - - 315

5. Plea to *scire facias* for breach of the condition of the usual bond given not to re-land, where the merchant claims drawbacks on goods intended for exportation;— that defendant was prevented from shipping and exporting accordingly, in consequence of seizure of part of the goods by revenue officers, not answered by replication, that the glass had not been regularly so shipped, or intended so to be, nor agreed in quantity with the notice given; imputing also a charge of fraud in attempting to obtain allowance of the drawbacks for a larger quantity than was actually shipped; and alleging, that the glass was lawfully seized for having a certain quantity of earthenware packed with it; and such replication held insufficient on demurrer.

Attorney General v. Pole - 387

6. A count under the 6th Geo. III. ch. 19, for concealing prohibited goods to prevent seizure, may be added to a count founded on the

8th of Anne, ch. 7, for having such goods in possession.

7. *Vide LIBEL, N° 2.—MISNOMER, N° 1.—TROVER.*

PLEADING

(*In Equity.*)

1. On a bill filed to stay proceedings in an action brought by defendant for dilapidations (founded on the destruction of the buildings thereon), and for a discovery whether he has not, since the commencement of the suit at law, assigned his interest in the premises; the defendant cannot protect himself from the discovery, or discharge himself from answering by a plea, that the building had been destroyed by fire, at a time when defendant was entitled, and had ever since continued out of repair and waste.

Duke of Bedford v. Macnamara 208

2. Where a defendant in his answer states that a modus has been immemorially paid to the vicar in lieu of tithes, and the vicarage be shown to have been *established and endowed within time of legal memory*, the Court will, notwithstanding the modus be so incorrectly laid, permit it to be re-stated for the purpose of taking issue to try the true modus, if an immemorial payment in lieu of tithes has been proved. *Prevost v. Bennett* 236

POSTEA.

The return of the Postea on an issue
H H 4 is

is a setting down of the cause for hearing, and the court will not grant an application to exclude it for a time from the paper of causes.

POST-HORSE DUTIES.

A coach licensed under a local Act, to be used as a stage, is not protected by such license from the post-horse duties, if hired wholly by an individual to perform a journey. And the proprietor is liable to account to the farmer of those duties for one fourth of the hire if let by him to carry out and bring back, notwithstanding such hiring may be to go to and return from some place within the distance and on the road to the place specified in his license; and although he receive no greater sum than his fare would have been had he proceeded full on the usual journey as a stage.

Fuge v. Cokram - - - 317

POUNDAGE.

The sheriff selling under a *venditione exponas* is not entitled to deduct any thing, either for extra expenses or poundage, or to return such a deduction. He must make a return of the whole sum produced by the sale, when the Court will order it to be paid over, deducting poundage; and he must move the Court for any extra allowance to which he may be entitled.

R. v. Jones - - - - 205

PRACTICE.

Vide AFFIDAVIT.—BAIL.—MOTION.—VENUE.—ORDER NISI.

PRESENTATION

(*Nest—to advowson.*)

Vide RIGHT OF PRESENTATION.

PRESUMPTION OF GRANT.

Vide GRANT.

PRIVILEGE.

Vide VENUE, N° 2.

PROCESS.

A variance in the body of copy of process from the writ itself is fatal, subversive of the process and all subsequent proceedings.

Morris v. Herbert - - - 245

PROHIBITED GOODS.

Vide CONSTRUCTION OF STATUTES.

PROPERTY TAX

(*Return to.*)

The ship's husband, or managing part-

part-owner, is bound to make a joint return of the aggregate profits of the concern to the Property tax.

Attorney General v. Borrodaile 148

R.

REFERENCE.

Reference for scandal and impertinence, is a sufficient proceeding, with effect, to save a bill.

Goodwin v. Davis - - - 373

Vide MORTGAGEE.—DEPUTY REMEMBRANCER'S REPORT.

REMOVING PROCEEDINGS.

The Exchequer will remove into its own Court proceedings commenced in the Courts of Great Session in Wales against revenue officers, for acts done in execution of their duty. *In re, Kingman* - - 206

RENDER.

1. Surrender of the principal on the day of expiration of the rule, before the issuing of an attachment, discharges the sheriff:

Morley v. Cole - - - 103

2. A defendant may be rendered during the whole of the day on which the rule to bring in the body expires.

R. v. Sheriff of London, in a cause of Parlett v. Barnett - - 338

3. The render is not complete or effectual till notice served - *ib.*

4. The Court will set aside an attachment against the Sheriff, on payment of costs, if the defendant has been rendered on the evening of the last day of the rule, and notice be given early next morning *ib.*

Vide ATTACHMENT.—BANKRUPT.

RENT.

Sheriff taking corn in the blade under *a fieri facias*, and selling it before rent due, is not liable to account to the landlord of the defendant, under the statute of *Anne*, for rent accruing subsequently to the levy and sale, although he is given notice, and though the corn be not removed from the premises until long afterwards, when a considerable proportion of rent has become due. The landlord's remedy in such case is by distress.

Gwilliam v. Barker - - - 274

REPORT.

Vide DEPUTY REMEMBRANCER'S REPORT.

REPUTATION.

Vide EVIDENCE, N^o 3, & 4.

REPLICATION.

Vide DISMISSAL OF BILL.—PLEADING, N^o 3, & 5.

RESTORATION

(Writ of.)

Vide CUSTOMS.

RIGHT OF PRESENTATION.

Vide CONTRACT.

RIOT ACT.

The clause of limitation of actions given against the hundred by the Hue and Cry Act, 27 Eliz. ch. 13, for the purpose of indemnifying the party robbed, held not to have been adopted by the Riot Act, 1st Geo. I. ch. 5, and the subsequent statutes, as a necessary consequence of their reference to the 27th Eliz. and that the words "in such manner, &c." are confined to the mode of reimbursing the person damaged on the recovery of damages. In the case of the demolition of the works of mills, the determining whether the works destroyed belonged to the mill, or were independent of it, forms a question for the jury, whose finding will be conclusive of that fact.

Rashforth v. Beatson - - - 343

S.

SECRET PARTNER.

The share of a secret partner in the joint stock in trade, being in the possession of an apparent partner,

and the sole ostensible trader, is not liable to the bankruptcy of the latter, as being within the meaning, or mischief of the 21st of James I. c. 19: the bankrupt having such an interest and qualified property in the secret partner's share, as to destroy the essential requisites of a true and independent ownership on the one hand, and of a fraudulent and reputed ownership on the other.

Caldwell v. Gregory - - - 119

SEIZURE.

Vide CUSTOMS.—PLEADING, N° 5.

SERVICE OF PROCESS.

1. Service of subpoena by leaving the label at a counting house of defendant not sufficient, unless given to a partner, or some acknowledged clerk there.
Menzies v. Rodrigues - - - 92
2. Service of subpoena issued on an injunction bill, though effected at eleven o'clock on the night of the return day, and at so great a distance from town as to render it impracticable for the defendant to appear in time to prevent an injunction for want of appearance, held to be sufficient service.
Nightingale v. Merryweather 287
3. The Court will not grant a distressing against a defendant who has not been served with process, other than by delivery of it to a person at whose house he had recently resided, unless it appear that he then lived there.
Horton v. Peake - - - 309

4. Service of declaration in ejectment in the name of the tenant, on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledges an appraisal of the service, sufficient to obtain judgment against the casual ejector. *Doe dem. Walker v. Roe* 399

5. *Vide ATTACHMENT, N° 2.—AFFIDAVIT, N° 5.*

SET OFF.

Vide Costs, N° 5.

SIGNATURE OF COUNSEL.

Signature of counsel to answer not appearing on the record, the defendant must apply for leave to amend. *Harrison v. Delmon.* 108

SILK GLOVES.

Vide PROHIBITED Goods.

SHOWING CAUSE.

If no one appear to show cause against a rule *nisi* for a new trial on the peremptory order day, the rule will be made absolute.

Parsons v. Nix - - - 312

SHERIFF.

Vide BAIL, N° 3 & 4.—EXTENT, N° 3 & 5.—POUNDAGE.—RENDER, N° 1 & 4.—RENT.

SPECIFIC PERFORMANCE.

1. The Court will not decree a specific performance of an agreement for a lease to be collected from letters where there is no definite term expressed for which the lease was to be granted, nor any reference *aliunde*, by which it might be ascertained. But *semble* otherwise if the letters had been more explicit, or had afforded any criterion for defining the object of the parties.

Gordon v. Trevelyan - - - 64

2. Acceptance or non-acceptance of title the criterion of right to specific performance of contracts in Courts of Equity. *Wyll v. the bishop of Exeter* - - - 296

3. *Vide DEGREE.*

STAMPS.

Vide Costs, N° 6.—LEGACY DUTY, passim.

STATUTES.

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8. c. 7. (Prohibited Goods) - 182
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12. c. 2. (Malt duties) - - - 438

James I.

21. c. 19. (Bankrupt—Secret partner) - - - - - 119

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George I.

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SUBPOENA.

Vide SERVICE OF PROCESS.

SUBSCRIBING WITNESS.

Subscribing witness ordered to show cause to the Court, why she should not make affidavit of the execution of an instrument attested by her.
Weston v. Faulkner - - - 308

SUPERSEDEAS.

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T.

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TITHES.

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TITLE.

(*Sufficiency of.*)

Vide DEPUTY REMEMBRANCER'S REPORT.

TRADING.

1. The ownership of trading vessels let to freight is a trade, or concern in the nature of trade, within the meaning of the 46th Geo. 3. *Attorney General v. Borrodale* 148
2. Buying and selling horses with an avowed intention to take out a license, and become a dealer, sufficient to constitute a trading within the meaning of the bankrupt laws, however limited the trading, and though no license has been actually taken

taken out; and the Court will grant a new trial after verdict found against evidence of those facts.
Wright v. Bird - - - 20

TROVER.

Trover lies for Corn cut by an outgoing tenant after the expiration of his term, though sown by him before that time, under the notion of being entitled to an away-going crop. *Davies v. Consop* 53

V.

VARIANCE.

Vide EXECUTION, N^o 1.—PROCESS.

VENUE.

1. The Court will not change the venue in any case where a trial has been had. *Butts v. Bilk* 146
2. An attorney (not being one of the four attorneys of this Court) is not as such entitled to the privilege of laying his venue in the county of Middlesex. *Fisher v. Fielding* 384
3. This Court will not admit as sufficient cause against a rule to

change the venue, that the declaration contains a count on a promissory note, unless the plaintiff undertake to give evidence on such count. *Baskerville v. Cooper* 374

VIEW.

In an information for duties against the proprietors of a glass manufactory, the Court will not grant a view of the premises where the question may be tried by the production of a model.
Attorney General v. Green - 130

W.

WASTE.

The Court will not treat a bill to restrain an acting partner from collecting or contracting debts, and appointing a receiver, as if it were in nature of a bill to restrain waste, whatever they might do where such partner should have been shown to have been guilty of culpable conduct, or to be insolvent.
Lawson v. Morgan - - - 303

WITNESS.

Vide SUBSCRIBING WITNESS.—AWARD.

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